



INTERNATIONAL DEVELOPMENT LAW: DECLARATORY, ASPIRATIONAL
AND POSITIVE.

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ABSTRACT

This thesis considers the different understandings of what 'law' is and applies this to the specific area of international development law. Two central questions are addressed. Firstly, what is the basis of international development law? Put another way, in what sense can international development law be spoken of as 'real' or 'true' law? Secondly, and a precursor to the first question is the question of what is 'real' law. The following preliminary questions are also addressed: what is 'international development law'? what are the sources of international development law? who formulates international development law? what characteristics or criteria can one use to identify law and thus identify international development law as true law? Paralleling growth of new areas of international law, and aspiring to a 'hard law', is a growing body of international development law. After World War II a distinct body of international development law emerged fostered by the newly independent countries of Africa and Asia. Despite the continued relevance of the legal aspects of the new international economic order (NIEO) debate of the 1970s, and the growing body of instruments, there is a dearth of current literature on the notion of international development law and its legal validity. This thesis addresses this gap. The questions are approached through a multiple grid of legal understandings. The thesis considers what stands as law in the positivist tradition, in the natural law or aspirational law tradition, and in the more recent tradition of legal process. Each of the types of law considered shows the different bases and varying status of international development law. Taken together, these also show the emergence of a legal structure consisting of norms, principles and rules. All this also points to increasing legalization of international development with a discernable movement towards hard law.

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ABBREVIATIONS

ACWL	Advisory Centre on WTO Law
AD	Anti-Dumping Agreement
AG	Agreement on Agriculture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CTG	Council for Trade in Goods
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
EC/EU	European Community/European Union
FAO	Food and Agriculture Organisation
G-77	Group of 77
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GNP	Gross National Product

GSP	Generalised System of Preferences
ICJ	International Court of Justice
IBRD	International Bank for Reconstruction and Development (World Bank)
IDA	International Development Association
IFAD	International Fund for Agricultural Development
ILA	International Law Association
ILO	International Labour Organisation
IMF	International Monetary Fund
ITTC	Institute for Training and Technical Cooperation
LDCs	Least Developed Countries
MFN	Most-Favoured Nation Treatment
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
ODA	Overseas development assistance
OECD	Organisation for Economic Co-operation and Development
TRIMs	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations

UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNEC	United Nations Economic Commission
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNICEF	United Nations International Children's Emergency Fund
UNIDO	United Nations Industrial Development Organisation
WHO	World Health Organisation
WTO	World Trade Organisation

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European Communities – Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 of the DSU by Ecuador (6 May 1999) WT/DS27/RW/ECU.

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Western Sahara (Advisory Opinion) [1975] ICJ Rep 12.

DECLARATION OF ORIGINALITY

I hereby declare that my thesis entitled, International Development Law: Declaratory, Aspirational and Positive, is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text, and is not substantially the same as any that I have submitted, or, is concurrently submitted for a degree or diploma or other qualification at the University of Buckingham or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or is concurrently submitted for any such degree, diploma, or other qualification at the University of Buckingham or any other University or similar institution except as declared in the Preface and specified in the text.

Signature:

Date:

CHAPTER 1:

INTRODUCTION

1.1 Aim

The aim of this thesis is to consider the different understandings of what 'law' is and to apply this to the specific area of international development law. The result should be a clearer understanding of the basis of international development law and its status.

Two central questions will be addressed. Firstly, what is the basis of international development law? Put another way, in what sense can international development law be spoken of as 'real' or 'true' law? Secondly, and a precursor to the first question is the question of what is 'real' law.

There are a few other questions that are incidental to these two central questions. To answer the question of the basis and status of international development law requires answering the questions: what is 'international development law'? Where do we need to look to find international development law, or in more conventional terms, what are the sources of international development law? Who formulates international development law? What characteristics or criteria can one use to identify law and thus identify international development law as true law?

1.2 General Context and Emergence of International Development Law

The general context within which these questions will be addressed is the increasing "legalization of world politics". Legalization is evidenced most recently in the expanding human rights regime, in the enunciations of a responsibility to protect, and in international environmental politics (the precautionary principle, for example). But these are also part of a larger trend which started with the close of the Second World War, witnessed in the human rights documents, the Geneva Conventions, the institutionalism of international monetary affairs, the establishment of a set of principles and legal norms for the regulation of international trade, and in the development of a European legal system of rights and obligations, not only for states, but also for individuals.

Abbott et al. note that legalization may go from 'soft' to hard law.¹ That is from general declarations to specific rules. But not only is there a general growth in norms and soft law but also the hardest of hard law most clearly evidenced in the legal system of the World Trade Organisation (WTO). Trade law is in close conformity to the requirements of legal perfection, or 'hard' law, and the WTO is producing a body of case law marked by "obligation and precision", and whose enunciation is through delegation to 'third parties' independent of states, whose business is to interpret law.

Paralleling growth of new areas of international law, and aspiring to a 'hard law', is a growing body of development law. The first harbingers of a law of development can be traced back to texts elaborated by the Allied nations during the Second World

¹ K.W. Abbott et al., 'The Concept of Legalization', *International Organization* vol.54, no.3, 2000, pp.401-402.

War. The United Nations Charter devotes Chapters IX and X to economic and social co-operation.²

After World War II a distinct body of development law emerged, fostered by Latin American dependency theorists and the newly independent countries of Africa and Asia. In the 1940s, economists from the United Nations Economic Commission (UNEC) for Latin America developed dependency theory to explain underdevelopment. The UNEC economists saw underdevelopment as being caused by unequal international economic exchanges.³ Concomitantly, the newly independent countries of Africa and Asia took the view that despite their political independence, they were tied into unequal and unfavorable economic relations with their former colonial masters that inhibited their ability to develop. For example, the newly independent countries were not able to repudiate unfavorable agreements on their political independence because of customary doctrines such as *pacta sunt servanda*, sanctity of contract, acquired rights, and state succession.⁴

Sympathetic legal commentators contended that the existing international legal order, similar to the economic order, was skewed against these newly independent countries. For example it was argued that foreign investors attempted to "internationalise" transnational investment agreements so that international customary legal doctrines such as *pacta sunt servanda* and minimum standards in

² Charter of the United Nations (concluded 26 June 1945, entered into force 24 October 1945) 59 Stat. 1031; TS 993; 3 Bevans 1153.

³ T. C. Lewellen, *Dependency and Development: An Introduction to the Third World*, Westport C.T., Bergin and Garvey, 1995 p. 60.

⁴ S. K. B. Asante, 'The Concept of Stability in Contractual Relations in the Transnational Investment Process' in K. Hossain (ed.), *Legal Aspects of the New International Economic Order*, London, F. Pinter, 1980, pp. 234, 244.

the treatment of foreign investors would apply to their transactions.⁵

The new legal arguments advanced were fashioned to support the goal of achieving, in the international economic order, more equity and help for developing countries to gain better control over their economies. One such argument put forward was the proposition that the doctrine of *pacta sunt servanda* (agreements must be kept) be curtailed by the doctrine of *clausula rebus sic stantibus* (things thus standing) under public international law.⁶ The main thrust of the arguments centered on the issues of international economic law, for example, international trade relations and a state's duties towards its foreign investors and their home states.

These legal arguments succeeded in receiving international legal recognition. Such recognition can be seen in such documents as the 1962 United Nations Declaration on Permanent Sovereignty over Natural Resources.⁷ Legal recognition can also be seen in the arbitral awards made in cases arising from the nationalisation of oil companies in the Middle East. For example in *The Government of the State of Kuwait v The American Independent Oil Company* it was held that stability clauses did not absolutely prohibit nationalisation and that states may nationalise foreign-owned property with payment of appropriate compensation.⁸ Generally, the legal arguments advanced influenced the compensation agreements that followed the

⁵ M. Somarajah, *The International Law on Foreign Investment*, Cambridge, Cambridge University Press, 1984, pp. 348-349.

⁶ S.K.B. Asante, 'The Concept of Stability in Contractual Relations in the Transnational Investment Process' in K. Hossain (ed.), *Legal Aspects of the New International Economic Order* London, F.Pinter, 1980, p.242. *clausula rebus sic stantibus* Latin for "things thus standing" is the legal doctrine allowing for treaties to become inapplicable because of a fundamental change of circumstances. It is essentially an "escape clause" that makes an exception to the general rule of *pacta sunt servanda* (agreements must be kept). See also art 62 of the 1969 Vienna Convention on the Law of Treaties.

⁷ UNGA Permanent Sovereignty Over Natural Resources UN Doc. A/5217 (1962).

⁸ Arbitration Tribunal *The Government of the State of Kuwait v The American Independent Oil*

nationalisation of key natural resources and other corporate enterprises in developing countries.

The legal arguments advanced, also, in part, led to the adoption of Part IV of the GATT, allowing non-reciprocal trade benefits for developing countries.⁹ States recognised that developing countries could not use the original one-size-fits-all nature of GATT rules. Further, states also recognised that the status of developing countries in the trading system was different from that of developed countries and that they had certain special interests that the trading system needed to take into account. This recognition of the status of developing countries in the trading system and their special interests was addressed by adopting several rules specifically concerning developing countries. The rules exempted developing countries from following the general rules. The rules were also designed to allow for developing countries' better access to developed countries' markets. Part IV exempted developing countries from reciprocal liberalisation and allowed developed countries to treat them better than 'most-favoured nations'.¹⁰

Part IV is also important because a definition of development, may be inferred and this is important because a law of development would require a legal category of "development". Part IV indicates a definition of development, albeit limited to the context. Part IV of GATT regards development in a social and economic context rather than a political context. As an example, development seems to mean the raising of standards of living and increased gain from trade for developing countries

Company (1982) ILM p.1023.

⁹ General Agreement on Tariffs and Trade (1994) 1867 UNTS 187.

¹⁰ Amin M. Alavi, *The Legalization of Development in the WTO: Between Law and Politics*, Austin [Tex.], Wolters Kluwer Law and Business, 2009, p.22.

mostly through increases in their export earnings. Furthermore, while Part IV indicates that trade will assist all CONTRACTING PARTIES to develop, Art. XXVI.c. states that there is a wide gap between standards of living in less-developed countries and in other countries. Thus, development can also be understood to be those issues that aim at neutralising or minimising the 'wide gap'.¹¹

1.3 NIEO and International Development Law: contemporary relevance

The legal arguments advanced for a new international legal order can be seen in the context of a wider debate, notably the call for a new international economic order (NIEO), a debate which itself gained momentum in the 1970s. Developing countries had expressed discontent with the existing economic order and had made claims for a new economic order as early as the 1950s.¹² For example, in 1952, Chile had raised the issue in the context of permanent sovereignty over natural resources in discussions relating to the Draft International Covenant on Human Rights.¹³ Developing countries formally made a call for a "new international economic order" at the Non-Aligned Summit in 1973.¹⁴ During the 1970s and 1980s, the debate was centered on the need for a new international economic order (NIEO) and its international legal implications.

The very idea of a development law did hit conceptual obstacles. One, and the major one, was the deep commitment of international law to equality of States.

¹¹ General Agreement on Tariffs and Trade (1994) 1867 UNTS 187.

¹² K. Hossain, 'Introduction: General Principles, the Character of Economic Rights and Duties of States and the NIEO' in K. Hossain (ed.), *Legal Aspects of the New International Economic Order* London, F. Pinter, 1980, pp. 1, 2.

¹³ M. Bulajic, 'Legal Aspects of New International Order' in K. Hossain (ed.), *Legal Aspects of the New International Economic Order* London, F. Pinter, 1980, pp. 45, 46.

¹⁴ K. Hossain (ed.), *Legal Aspects of the New International Economic Order* London,

Development law did have as its object the creation of special rights for some states and special responsibilities for other states. The criticism was (in part) derived from the doctrine of equality of states, whereby, rights and duties do not vary according to the level of development. If we are to follow this line of reasoning, there could be no development law to speak of.

Some would argue that the NIEO debate including the debate on the need for a new international legal order grew stale, and eventually died! For example F. Roesler commenting on the Charter of Economic Rights and Duties of States, one of the key documents of the NIEO noted: "[The Charter of Economic Rights and Duties of States] made all aspects of international economic cooperation subservient to the goals of development.... Today the new international economic order is long forgotten, and the Charter lies in the waste paper basket of history."¹⁵

The strongest argument against this view was presented by Asif H. Qureshi who demonstrated in a key work of 2010 that the NIEO debate is still 'alive' and particularly in its legal aspects. In 2010 he wrote a key article on the NIEO. He focused particularly on paragraph 4 of the Declaration on the Establishment of a New International Economic Order of 1974.¹⁶ Qureshi demonstrated that several key principles found in paragraph 4 of the UN General Assembly resolution of 1974 were still guiding current international legal practice.

F.Pinter, 1980, pp. 1.2.

¹⁵ F. Roesler, 'Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past', in A.O. Krueger (ed.), *The WTO as an International Organization*, Chicago, University of Chicago Press, 1998, p.213.

¹⁶ UNGA Declaration on the Establishment of a New International Economic Order. UN Doc Res A/S-6/3201 (1974).

Looking back over the course of the development of development law, it is evident that development law really starts here and that Qureshi's intuition and his argument, were not misstated. Each of the principles of the NIEO have been taken up, elaborated and hardened. The Declaration on the Establishment of a New international Economic Order of 1974 may be considered the original document of development law.

The basic statement of the Declaration on the Establishment of a New International Economic Order of 1974 is that of equity between developed and developing countries. The principle of equity can be found in articles 4(b) and 4(c) of the declaration, which state, respectively, : "the broadest co-operation of all states members of the international community based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all", and "full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries, bearing in mind the necessity to ensure the accelerated development of all the developing countries, while devoting particular attention to the adoption of special measures in favour of the least developed land-locked and island developing countries as well as those developing countries most seriously affected by economic crises and natural calamities, without losing sight of the interests of other developing countries."¹⁷ These principles have been enunciated repeatedly in a number of current documents. Articles XVI, XVII, XX(j) and Part IV of the General Agreement on Tariffs and Trade (GATT) all refer to equity.¹⁸ Similarly, several of the WTO Uruguay Round Agreements make reference to equitable treatment (examples include the Preamble

¹⁷ UNGA Declaration on the Establishment of a New International Economic Order, UN Doc Res A/S-6/3201 (1974), art 4(b) and 4(c).

to the Agreement on Import Licensing; Articles 4 and 7 of the Agreement on Textiles and Clothing; Article XIV of the General Agreement on Trade in Services and the preamble to the Agreement on Agriculture).

Another principle of the Declaration on the Establishment of a NIEO is that of extending assistance to developing countries. For example article 4(i) of the declaration on the establishment of a NIEO states: "the extending of assistance to developing countries, peoples and territories which are under colonial and alien domination, foreign occupation, racial discrimination or apartheid or are subjected to economic, political or any other type of coercive measures to obtain from them the subordination of the exercise of their sovereign rights and to secure from them advantages of any kind, and to neocolonialism in all its forms, and which have established or are endeavoring to establish effective control over their natural resources and economic activities that have been or are still under foreign control"¹⁹ and article 4(k) "extension of active assistance to developing countries by the whole international community, free of any political or military conditions"²⁰ both speak of assisting developing countries.

A good example of a hardening of the principle of assisting developing countries can be seen today in Article 66.2 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)²¹ which creates an obligation on developed countries to transfer technology to developing countries. Article 66.2 of TRIPS 1994

¹⁶ General Agreement on Tariffs and Trade (15 April 1994) 1867 UNTS 187.

¹⁸ UNGA Declaration on the Establishment of a New International Economic Order, UN Doc Res A/S-6/3201 (1974), art 4(i).

²⁰ *Ibid* art 4(k).

²¹ Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C/IP/1.

states: "Giving to developing countries access to the achievements of modern science and technology, and promoting the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies." Article 66.2 is further hardened by a monitoring mechanism that requires developed countries to report on incentives created by them, for the transfer of technology from their countries to developing countries.²²

Another current principle, indeed gaining currency is that of fair trade. Article 4(j) of the Declaration on the Establishment of the NIEO 1974 enunciates: "Just and equitable relationship between the prices of raw materials, primary commodities, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy."²³ It can be seen in some measure, today, in the Doha Declaration in its reference to securing for developing countries "a share in the growth of world trade commensurate with the needs of their economic development."²⁴

²² Decision of the Council for TRIPS, Implementation of Article 66.2 of the TRIPS Agreement (19 February 2003) IP/C/28. In Doha, it was agreed that the TRIPS Council would "put in place a mechanism for ensuring the monitoring and full implementation of the obligations" pursuant to art 66.2 of the TRIPS agreement. The TRIPS council therefore adopted this decision setting up this mechanism in February 2003. It details the information developed countries are to supply, on how their incentives are functioning in practice:

http://www.wto.org/english/traop_e/trips_e/techtransfer_e.htm (accessed 13 August 2014).

²³ UNGA Declaration on the Establishment of a New International Economic Order, UN Doc Res A/5-6/3201 (1974), art 4(j).

²⁴ Doha WTO Ministerial Declaration (14 November 2001), paragraph 2, WT/MIN(01)/DEC/1; 41 ILM 746 (2002). Also available from http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (Accessed 15 August 2014).

Indeed the traditional doctrine of equality of states has been overturned in the notions of preferential treatment for developing countries. In the Declaration on the Establishment of a NIEO it is expressed in article 4(n): "Preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international co-operation whenever possible". This principle too is clearly not forgotten. It is a prominent feature of the WTO Uruguay Round Agreements and continues today in the Doha Round.

The two major remaining clauses of the Declaration on the Establishment of a NIEO, on preferential treatment for developing countries, and accelerating the development of developing countries all have their contemporary application. Article 4(s) the principle on "strengthening, through individual and collective actions, of mutual economic, trade, financial and technical co-operation among the developing countries, mainly on a preferential basis" can be seen very much 'alive' in such provisions as the WTO Enabling Clause²⁵, and in the emergence of co-operation in trade between developing country members of the WTO. On "the need for developing countries to concentrate all their resources for the cause of development" (article 4r), this principle can be seen in the declaration on the right to development²⁶ and in the Millennium Declaration²⁷.

The impetus of the NIEO can be summarised as follows: that developing countries must develop, that the gap in standards of living between developed and developing

²⁵ Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (28 November 1979) L/4903. Available at www.wto.org (Accessed 15 August 2014).

²⁶ UNGA Declaration on the Right to Development, A/RES/41/128, (1986), preamble, art 4(2).

²⁷ UNGA United Nations Millennium Declaration, UN Doc A/55/L.2 (2000) for example paragraphs 5 and 14.

countries must narrow, and that in order to achieve these aims, there must be a transfer of resources from the developed countries to the developing countries.

1.4 Sources of International Development Law

The sources of development law are numerous and cut across the whole gambit of relations between developed and developing countries.

At the forefront in providing legal instruments that constitute development law is the United Nations. These instruments include the Universal Declaration of Human Rights 1948.²⁸ For example Article 28 of the Universal Declaration of Human Rights creates a right for everyone to a social and international order in which all the rights and freedoms enunciated in the Declaration can be fully realised. The General Assembly has adopted a number of resolutions and declarations focusing on development. These include General Assembly Resolution 2626(XXV) adopted on 24 October 1970, called the "International Development Strategy for the Second United Nations Development Decade"; General Assembly Resolutions 3201 and 3202 adopted on 1 May 1974, called the "Declaration on the Establishment of a New International Economic Order" and "Programme of Action on the Establishment of a New International Economic Order" respectively; and General Assembly Resolution 3281 adopted on 12 December 1974 called the Charter of Economic Rights and Duties of States. Also important is the UN General Assembly resolution on the "Right to Development" (1986).²⁹

²⁸ UNGA Universal Declaration of Human Rights UN Doc A/810 (1948).

²⁹ UNGA Declaration on the right to development UN Doc A/Res/41/128.

Other important sources of development law are world conferences. Key conferences for promulgating norms of development law include: in 1972 the United Nations Conference on the Human Environment held in Stockholm³⁰; in 1990 the United Nations Conference on Trade and Development Second United Nations Conference of Least Developed Countries and the outcome documents, the Paris Declaration and Programme of Action for the Least Developed Countries for the 1990s³¹; in 1992 The United Nations Conference on Environment and Development, held in Rio de Janeiro, ('Rio Conference') and the outcome Agenda 21, a blueprint of the action programme of the Rio Conference, detailing laws and institutions designed to promote development³²; in 1993 the United Nations World Conference on Human Rights and the outcome Vienna Declaration and Programme of Action³³; in 1994 the United Nations International Conference on Population and Development and the outcome Report of the International Conference on Population and Development (Cairo Declaration)³⁴; in 1995 the World Summit for Social Development held in Copenhagen and the outcome Copenhagen Declaration.³⁵

Human rights law also provides a rich source of development law. An example is the International Covenant on Economic, Social and Cultural Rights (1966)³⁶ (entered into force on Jan 3, 1976). Another example is the Universal Declaration of Human Rights

³⁰ 'Report of the United Nations Conference on the Human Environment' (5-6 June 1972) UN Doc A/CONF.48/14/Rev.1.

³¹ 'Paris Declaration and Programme of Action for the Least Developed Countries' (3-14 September 1990) UNCTAD/RDP/LDC/58.

³² 'Report of the United Nations Conference on Environment and Development' (3-14 June 1992) UN Doc A/CONF.151/5/Rev.1.

³³ Vienna Declaration and Programme of Action (14-25 June 1993), UN Doc. A/CONF.157/24).

³⁴ 'Report of the International Conference on Population and Development' (5-13 September 1994) UN Doc A/CONF.171/13.

³⁵ Report of the World Summit on Social Development' (6-12 March 1995) UN Doc A/CONF.166/9.

³⁶ UNGA International Covenant on Economic, Social and Cultural Rights, UIN Doc A/6316 (1966).

(1948).³⁷

Other treaties making up the body of development law include those dealing with environmental issues and those dealing with the global/shared resources. An example of the former is the Vienna Convention for the Protection of the Ozone Layer (1985)³⁸, and a good example of the latter is the United Nations Convention on the Law of the Sea(1982).³⁹

This corpus of development law is obviously not a closed list. There are for instance norms of development that may well have legal import from 'unofficial' conferences convened by international development agency officials, activists, non-governmental organisations (NGOs) and scholars. Development law is also to be found in key institutions such as the International Monetary Fund (IMF) and World Bank.

The point is that there is a corpus of international development law, defining the rights and duties of developing and developed countries as between each other.

1.5 Methodology

The question will be approached through a classical positivist position, using Abbott et al's concept of legalization⁴⁰, supplemented in its understandings by reference to H.L.A. Hart and the idea of a legal system. Hart proposed that there is more than one

³⁷ UNGA Universal Declaration of Human Rights, UN Doc A/810 at 71 (1948).

³⁸ Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 323.

³⁹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

⁴⁰ Abbott, K.W., et al., 'The Concept of Legalization', *International Organization* vol.54, no.3, 2000.

way to understand what law is, and this thesis takes the view that there is a range of meanings to the term law, each of which is, however, coherent, and each of which both includes and excludes phenomena that purport to be 'law'. There is aspirational law, declaratory law and positive (hard) law. There is also law as process.

The understanding of 'real' law as understood in Abbott et al. concept of legalization (obligation, precision, delegation)⁴¹ is better captured through the classic distinction, posed by H. L.A. Hart, between primary and secondary law, the first the enunciation of the obligation, the second the development of rules for locating law and for defining it.⁴² Some legal theorists would only consider Hart's secondary law to be law, but this is a misunderstanding of his theory. It is the original obligation which sets the direction of the secondary law and which the secondary law interprets and places. Without the primary law, there would be no secondary law.

This leads to the question of the obligatory basis of primary law. Here, the body of law known as declaratory law will be considered. Development law grew largely on the basis of declaratory law. The interesting question is what makes declaratory law claim the status of 'law'? In part, this is to do with the source of the declaration, in part with the precision with which the declaration is posed, and whether we may name a subject of the law, and an agent against whom a claim may be made. It is also to do with a background theory concerning justice. Declaratory law is an expression of natural justice.

Before the declaratory, or at least underpinning the declarations comes an

⁴¹ *ibid* pp. 401-419.

⁴² H.L.A., Hart, *The Concept of Law*, 2nd edn., Oxford University Press, 1994.

aspirational law, suggested by the Japanese international lawyer Yasuaki Onuma.⁴³ There is an important distinction between declaratory law and aspirational law. Aspirational law represents, or expresses, a genuine popular aspiration, nationally or internationally, the expressed goal being one that is sincerely desired by government or a section of government, with subsequent legal processes demonstrating a movement towards the goal. In international law, the legal processes include treaties, custom and pronouncements by the International Court of Justice and arbitration tribunals. 'A genuine popular aspiration' may be considered the first criterion; that which is 'sincerely desired by government or a section of government' is the second criterion, and 'subsequent legal processes' is the third criterion of aspirational law. It has been contended that if law consists of, *inter alia*, rules by which a society regulates the conduct of its members, then aspirational law is true law.⁴⁴ Aspirational law is a kind of law by means of which societies 'legislate' goals for themselves and can regulate and direct the actions of members of society.⁴⁵ Even though aspirational law may be lacking in enforcement and may not be honoured in practice to begin with, the goal-setters challenge themselves to live up to their own aspirations and pre-authorise actions, with the aim of bringing their actions into compliance with their aspirations.⁴⁶

Finally, there is law located in the regulatory principles that arise out of policy formulation. The theory of this type of law has been enunciated through the "legal process" or "law as process" school of legal understanding. By this conception of law,

⁴³ Y. Onuma, 'International Law in and with International Politics: The Functions of International Law in International Society', *European Journal of International Law*, vol. 14, no. 1, 2003, pp. 105-139.

⁴⁴ P. Harvey, 'Aspirational Law', *Buffalo Law Review*, vol. 53, no. 3, 2004, p. 719.

⁴⁵ *Ibid* p. 718.

⁴⁶ *Ibid*.

international law is the process by which members of a community clarify and secure their common interest in the shaping and sharing of values.⁴⁷ Professors Lasswell and McDougal, the founders of policy oriented jurisprudence developed a classification to take stock of what people value: these common values are wealth, well-being, enlightenment, skill, affection, respect, rectitude and power.⁴⁸ Of these values, wealth, well-being, skill and enlightenment can be seen to be directly related to development law.

Law as process conceives as law, decisions that are authoritative and controlling.⁴⁹ Only those decisions that are made by authorised persons or organs, in appropriate forums and within the framework of established procedures, are 'legally' valid decisions. Put another way, the only decisions to be characterised as law, are those decisions that are made by persons or organs expected to make them, in accordance with criteria expected by the members of the community and by authorised procedures. This conception of law as a continuing process of authoritative decision making entails a variety of phenomena, including claims and counterclaims and decisions by a variety of authorised decision makers.

1.6 The Background Theory: Norms and the English School

This study can also be summed up as an identification of the settled norms and of the emerging norms of international development law, as understood in the English

⁴⁷ A. Slaughter, et al., 'Appraising the Methods of International Law: A Prospectus for Readers' *American Journal of International Law*, Vol. 93, 1999, p. 293.

⁴⁸ M.S. McDougal and W. Reisman, 'The Prescribing Function in the World Constitutive Process: How International Law Is Made', *Yale Studies in World Public Order*, vol. 6, no. 2, Spring 1980, pp.249-284.

⁴⁹ *ibid* pp.249-284.

School of international studies. International society is the central concept studied by the English School, and international society in turn is constituted by international norms. The compass and nature of international society is identified by looking at what constitutes a norm, how to characterise the norm, when a norm is established, and the strength of a norm.⁵⁰ The moment of the norm's emergence and what specifically constitutes the norm are primary. Also important, albeit secondary, are the processes of the production of the norm.

The English School has criteria with which to identify norms that have emerged i.e. settled norms. International law is one answer that the English School provides for identifying a settled norm. According to the English School, law and the norm are the same.⁵¹ According to Alan James a member of the English School concerned with exploring the nature of international law and its place in international society, "international society, like domestic, relies primarily on law for its framework of ideas about orthodox behaviour [the norm]".⁵² For James the key explanation for this is to be found in the different obligatory force of legal and non-legal rules. Non-legal rules carry an uncertain sense of obligation as those to whom they apply are expected rather than obliged to observe them. With non-legal rules society feels that it has no ground for insisting upon observance. Observance is not demanded but is rather only the done thing. Law on the hand, continues James, is inseparably associated with the idea of strict obligation as someone subject to a law is bound by it and must behave accordingly. If one subject to a law does not behave according to it, society via its organs and/or its interested members is entitled to insist on obedience.

⁵⁰ C. Navari, 'Liberalism, Democracy and International Law-An English School Approach' p.3.
⁵¹ *ibid* p.4.

⁵² A. James, 'Law and Order in International Society', in A. James (ed.), *The Bases of International Order-Essays in Honour of C.A.W. Manning*, London, Oxford University Press,

Following from this, argues James, law in most instances strives to make its obligatory effect absolutely clear, for if this were not the case, there would be nothing precise to which its subjects could be held. James concedes that there are instances, albeit exceptional, where law is used for symbolic or standard-setting purposes as for example in treaties of friendship. Nonetheless, the main function of law is to create a precise, exact, and binding relationship. Comelia Navari has summarised the criteria for identifying a settled norm as follows: firstly the law must oblige, secondly, the phenomenon (under study) must be sufficiently defined to allow a judge to determine derogation, thirdly derogation from the obligation must give rise to a sanction of some sort.⁵³

The English School also provides criteria for identifying emerging norms. According to Professor Yasuaki Onuma, a prominent international lawyer, emerging norms or aspirational law can be identified by the following criteria: the norm or rule will be present in domestic society, and will regulate the conduct of its members; at the international level, the expressed goal will be one that is sincerely desired by government or a section of government; and finally, and more importantly, subsequent legal processes will demonstrate a movement towards that goal.

Comelia Navari has also summarised the English School's approach to identifying an emerging norm as follows: firstly, wordings in resolutions are repeated and lead to further elaborations in later resolutions, secondly, the endorsement is hearty/sincere, (on the part of government, a section of government, or section of the population of a state) and thirdly the injunction applies generally, regionally, or specifically. The

1973, p. 67.

⁵³ C. Navari, 'Liberalism, Democracy and International Law-An English School Approach' p.5.

injunction may be located in international treaties, resolutions, or statements.⁵⁴

In identifying the settled norm the English School's approach to international law is positivist (particularly nineteenth and early twentieth-century legal positivism) and this approach can be justified. The English School considers international law to be "a body of rules which binds states and other agents in world politics and is considered to have the status of law."⁵⁵ The English School is thus concerned with identifying actually existing norms of state behaviour. Laws and in particular hard i.e precise, widely accepted, and observed laws, point to the most substantial norms.⁵⁶ Justification for this conception of law is provided by Wilson where in referring to Bull, he states that without reference to a body of rules, the idea of law becomes unintelligible.⁵⁷ There must be a body of binding rules, agreed upon rules to which reference can be made.⁵⁸

In identifying the emerging norm, the English School recognises that not all international law is observed in a strict sense from the outset. For example, it is well known that there is a gap between major human rights treaties and reality.⁵⁹ Yasuaki Onuma calls treaties that embody global aspirations shared by an overwhelming majority of members of international society, that "induce convergence, if not strict observance, of the behaviour of diverse members of international society over a period of time" aspirational.⁶⁰ Dorothy Jones has observed a trend in this aspirational

⁵⁴ C. Navari, 'Liberalism, Democracy and International Law-An English School Approach' p.5.
⁵⁵ H.Bull, *The Anarchical Society- A Study of Order in World Politics*, 3rd edn., Basingstoke, Palgrave Publishers Ltd.

⁵⁶ P. Wilson, 'The English School's Approach to International Law', in C.Navari (ed) *Theorising International Society: English School Methods*, Basingstoke, Palgrave Macmillan, 2009, p. 177.
⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid.*, p. 170.

⁶⁰ Y. Onuma, 'International Law in and with International Politics: The Functions of International

law-making since the end of the second world war and in this regard speaks of a declaratory tradition in international law.⁸¹

The thesis follows this approach in conceiving of law as having this 'dual' nature. There are settled norms, being by traditional conceptions, 'hard' law. There are also emerging norms that 'aspire' to becoming 'hard' law. The emerging norms are themselves distinguishable depending on the point at which they are on the continuum of aspiring to hard law, i.e. as declaratory, or aspirational. There is also law as process.

The approach will be elaborated in the methods chapter.

1.7 Thesis outline

This chapter has highlighted the continued relevance of the NIEO debate, particularly in its legal aspects and therefore the continued need to address the question of the legal status and basis of international development law. The chapter also highlighted the increasing number of areas of development law, including resolutions, declarations, conference outcome documents and treaties covering trade, the environment and human rights.

Proceeding from the basis that there is more than one way to understand what is law, the thesis will first outline each of these types of law i.e. aspirational law, declaratory

Law in International Society'. *European Journal of International Law*, vol.14, no.1, 2003, pp.105-139.

⁸¹ D.V. Jones, 'The Declaratory Tradition in Modern International Law', in T.Nardin and D.R. Mapel (ed.), *Traditions of International Ethics*, Cambridge, Cambridge University Press, 1992, p.42.

law, positive law and legal process, identifying the particular characteristics or criteria which act as the identifying factors (Chapter 3: Method-Legal Concepts and International Law). It will then consider each in turn as that applies to the body of development law, beginning with Aspirational Law (Chapter 4); Declaratory Law (Chapter 5); Hard Development Law (Chapter 6) and Legal Process (Chapter 7). Chapter 4 illustrates international development law under the lens of aspirational law criteria. Aspirational law is a good reflection of emerging norms. Chapter 4 therefore will also show the emerging norms of international development law. Chapter 5 illustrates international development law under the lens of declaratory law criteria. Declaratory law also provides a good indication of emerging norms and of principles. Chapter 5 therefore will show international development law norms and principles. Chapter 6 illustrates international development law under the lens of hard development law (positive law). It employs Hart's conception of law in terms of primary rules and secondary rules and focuses on development law in the context of the WTO agreements and will reveal the primary rules of obligation of development law as well as the secondary rules. Chapter 6 also illustrates the importance of the WTO as a site for hard development law. Chapter 7 illustrates international development law under the lens of legal process. Chapter 7 reveals the numerous actors involved in international development law as well as a variety of legal phenomenon each performing a particular function. Chapter 7 also reveals the most settled principles of international development law.

The analysis will be preceded by a review of the literature which has something to say about development as law, to put the argument into its intellectual context.

CHAPTER 2

LITERATURE REVIEW

2.1 Introduction

This chapter aims to show the continued relevance of the international law of development and the NIEO arguments from which it emerged. International development law is the law governing relations between developed and developing countries. International development law defines the rights and duties of developing and developed countries as between each other.

The subject of international development law has been given limited treatment, particularly in anglophone literature.

The approach taken in this chapter is to review the main themes, approaches and perspectives taken on the subject of international development law.

The outline of the chapter is as follows: first, it traces the emergence of the notion of international development law in the literature. This will be followed by an overview of the significant contribution made by French scholars to the subject of international development law and particularly the breadth of issues they raised as encompassing the subject matter of international development law. Following this will be criticisms that were made of the French works and of the subject of international development law generally. I will then turn to the dearth of anglophone literature on the subject.

This will be followed by a review of the "Aspects of International Law of

Development” symposium held in London in 1985 which sought to bring together the francophone and anglophone views on the subject.

The conclusion to this chapter links the foregoing to their continued relevance today and thus the significance of undertaking this study.

2.2 Emergence of International Development Law in the Literature

The emergence of the notion of international development law can be traced to a key article by **Michel Virally** in 1965.⁶² Prior to **Virally's** article, in the previous year, in the opening of the first UNCTAD, the Argentine economist **Raul Prebisch**, had made the suggestion that in order to take account of the disparities between developed and developing countries, the latter ought to be granted a preferential regime in international trade.⁶³ Further, **Prebisch** suggested that the preferential regime ought to be enshrined in law, which at the time was a very novel idea. **Prebisch** suggested that the twin pillars of the GATT, non-discrimination and reciprocity, be changed in favour of developing countries. The following year, 1965, **Virally**, in his article stated that the disparities in development between developing and developed countries, should be the “subject of a systematic examination by lawyers”. Further **Virally** was of the view that the disparities in development should be taken into account in a rethinking of the fundamental principles of contemporary international law that, up to that point had been thought of ‘in a purely formal way.’ **Virally** felt that the time was

⁶² M. Virally, ‘Vers un droit international du développement’ *Annuaire français de droit international*, vol.11, 1965, pp.3-12 in G.Feuer, ‘International Development Law: The Establishment of a Francophone School of Thought’, *European Journal of Development Research*, vol.3, no. 2, 1991, p. 71.

⁶³ R. Prebisch, ‘Vers une nouvelle politique commerciale en vue du développement économique’. Report to the secretary-general: of UNCTAD, text in French. United Nations, New York and Paris: Dunod, 1964, in G. Feuer, ‘International Development Law: The Establishment of a Francophone School of Thought’, *European Journal of Development Research*, vol.3, no. 2,

ripe to "lay down the foundations of a genuine international development law" by taking account of what was only "the international law of differences in development." Virally, proposed that research be conducted at the levels of: principles; that of institutions; that of the rules governing inter-state relations; and the relationships between States and international organisations, in all areas in which the effects of unequal development exist. Virally added to his proposal of a research agenda, the relationship between developing countries and foreign private companies. Virally saw the end result of such research as "intended to bring about an adjustment through the adoption of rules offsetting the effect of the various factors that cause disequilibrium."

2.3 Francophone Literature

Virally's article was followed by years of a virtually exhaustive survey of the field of international development law by French and Francophone research. These studies published in French covered several spheres as they pertained to international development law: the classification of states; the role of international organisations; legal procedures; the status of United Nations resolutions; North-South contracts; sovereignty over natural resources; investment; nationalisation; transnational companies; joint ventures; technical assistance; transfers of technology; financial assistance; bilateral cooperation; the debt problem; the actions of the IMF, World Bank, GATT and the EEC; regional integration between developing countries; trade in basic products and manufactured goods; the system of preferences, the right to development.⁸⁴ These writings were primarily of a survey nature in which the general

1991, p. 71.

⁸⁴ G. Feuer, 'International Development Law: The Establishment of a Francophone School of

state of play was described.

Guy Feuer has summarised the key works of French scholars who have either provided a defence, or an illustration, or an objective outline of the subject of the international law of development.⁶⁵ They include handbooks, general works, lectures given at the Academy of International Law at the Hague, conference proceedings and theses published in French. The handbooks include those of Maurice Flory (1977)⁶⁶, Alain Pellet (1987)⁶⁷, Jacques Bouveresse (1990)⁶⁸, Feuer and Cassan (1991)⁶⁹; lectures given at the Academy of International Law at the Hague include those given by Guy de Lacharrière (1973)⁷⁰, Maurice Flory (1974)⁷¹ and Rene-Jean Dupuy (1979)⁷²; In 1973 a conference of the Société française pour le droit international, was held at Aix-en-Provence, to discuss an initial clarification of the discipline of international development law (Aix Conference); Theses include that of Georges Merloz who provided a general survey of the way in which the international law of development was perceived within UNCTAD from its establishment until 1975 (Merloz 1980).⁷³ To be noted is the work of J. Bouveresse (1990)⁷⁴. Bouveresse introduces the element of cultural difference as well as the evident one of economic disparity, into the field. Additionally Bouveresse gives extensive technical detail

Thought', *European Journal of Development Research*, vol.3, no. 2, 1991, p. 72.
⁶⁵ *Ibid* pp. 72-73.

⁶⁶ M.Flory, *Droit international du développement*, Paris, PUF,1977.

⁶⁷ A. Pellet, *Droit international du développement*, 2nd edn., Paris, PUF, 1987.

⁶⁸ J.Bouveresse, *Droit et politiques du développement et de la coopération*, Paris, PUF, 1990.

⁶⁹ G. Feuer and H. Cassan, *Droit international du développement*, 2nd edn., Paris, Dalloz.

⁷⁰ G.I. de Lacharrière, 'L'influence de l'inégalité de développement des Etats sur le droit international', *Recueil de Cours*, vol. II, 1973, pp. 231-269.

⁷¹ M.Flory, 'Souveraineté des Etats et coopération pour le développement' *Recueil de cours*, vol. I, 1974, pp.257-329.

⁷² R.J. Dupuy, 'Communauté internationale et disparités de développement' *Recueil de cours*, vol.165, 1979, pp. 13-231.

⁷³ G. Merloz, La CNUCED, *Droit international et développement*, Publications de la Faculté de droit de l'Université René Descartes, Faculté de Droit, Paris et Brussels, Etablissement Bruylant

⁷⁴ J. Bouveresse, *Droit et politiques du développement*, Paris, PUF, 1990.

regarding problems of multinational corporations, technology transfer, commodity agreements, public international finance and vitally, international trade law.⁷⁵

2.4 Criticisms

The French concept of international development law was not warmly welcomed by all. **Maurice Flory** gives examples of some of these critical currents at the Anglo-French Symposium on "Aspects of the International Law of Development", held under the umbrella of the Cultural Department of the French Embassy in London from January 11 to 13, 1985.⁷⁶ **Flory** points to the work of algerian author, Professor **Madjid Benchikh** who opposed the French theories: **Benchikh** criticised what he saw as the qualitative presentation of underdevelopment which led to theoretical errors due to the absence of historical perspective on the beginning of the phenomenon i.e. an absence of economic history on the beginning of the phenomenon. **Benchikh** refers to the Marxist dialectic stating that the ideas being propounded in the international development law, far from providing the basis for an international law on development, would lead instead to an 'international law on under-development'. He arrives at this conclusion by following this simple line of reasoning: the problem is that of the fight against underdevelopment. It is therefore essentially on this ground that the law must be evaluated. If it maintains underdevelopment, it will be an international law of underdevelopment, whatever may be the evolution of international relations which it crystallizes or favours. **Benchikh** based his analysis on social and economic phenomena. He rejected the approach of

⁷⁵ A. Carty, (ed.), *Law and Development*, New York, New York University Press, 1992, p. xviii.

⁷⁶ M. Flory, 'A North-South Legal Dialogue: The International Law of Development', in F. Snyder and P. Slinn (ed.), *International Law of Development: Comparative Perspectives*, Abingdon, Professional Books Limited, 1987, pp.11-26.

the jurist who claiming to be confined by disciplinary boundaries, relied on the economist. Benchikh believed that what was required was a political and economic engagement. Drawing from economic history, albeit, a particular view of economic history, Benchikh posited that underdevelopment is directly linked to the capitalist development of Europe and then of the United States and of Japan. The underdevelopment of the periphery is a consequence of the development of the centre. Benchikh considers that far from eradicating the causes that have resulted in underdevelopment, the international law of development organises the existing system. At the same time the international law of development conceals the relationships of domination and exploitation between industrialised countries and developing countries. These ideas would be most familiar with economists, particularly proponents of centre-periphery theory (for example, economists Gerard de Bernis, Samir Amin, Charles Pallois, Andre Gunder Frank, Celso Furtado).

Useful for lawyers, Flory also summarises the introductory report of the Colloquium of Algiers held in 1976, in which Benchikh transposed centre-periphery theory into the analysis of State sovereignty.⁷⁷ By this analysis Benchikh showed that the sovereignty of developing countries had two particular features: firstly, it was decentred, externally oriented, penetrated by multinational firms and controlled for the benefit of a centre situated in capitalist industrialised countries; secondly, it was fragmented and broken up into small pieces for the benefit of a restricted class, the bourgeoisie, which does not perform this sovereignty for the benefit of the State, but rather does so, for its own interest which coincides with that of the external decision-making centre. With this as a starting point, it was an easy step for Benchikh to re-

⁷⁷ M.Flory, 'A North-South Legal Dialogue: The International Law of Development', in F.Snyder and P.Slinn (ed.), *International Law of Development: Comparative Perspectives*, Abingdon,

examine and modify the postulate of sovereignty and to proceed to a similar re-examination of State equality.

Flory also summarises Benchikh's position on the legal technique of duality of norms, whereby one norm applies to developed countries and another differential norm applies to developing countries. For Benchikh the analysis of underdevelopment which underpins the establishment of the duality of norms is incorrect. Crucially the legal instruments set in place will not achieve their intended objective. Benchikh saw the duality of norms as based on the observation of unequal development, whilst ignoring the historical fact that underdevelopment is directly linked to the capitalist development of Europe, then of the USA and then of Japan. According to Benchikh underdevelopment is the result of the transfer towards developed countries of resources and surplus value created by the activities of underdeveloped countries. The legal technique of duality of norms thus only reinforces the theory of unequal exchange. Further, argues Benchikh, duality of norms increases the dependency of developing countries by strengthening the patterns of trade which take place primarily with developed countries with a market economy. The derogative nature of a system based on the duality of norms with regard to, for example GSP, Benchikh contends, leaves in place the general and fundamental rule of reciprocity. Benchikh concluded that class struggle characterises both the purely internal level as well as the international scale, with international trade being a very significant reflection of this.

Flory identified valid loopholes in Benchikh's work.⁷⁸ With regard to the duality of

Professional Books Limited, 1987, p.15.

⁷⁸ M.Flory, 'A North-South Legal Dialogue: The International Law of Development', in F.Snyder

norms, Benchikh makes no mention of the Tokyo Round (1979) which changed the nature of GSP by the introduction of an enabling clause which created a permanent and legal basis for GSP. His emphasis on the primacy of the economy, with the law simply following, is problematic. What has meaning in economic terms may have little or no significance in international law. Benchikh also criticised the criteria of selection used by the United States under its GSP as instruments of pressure and the practice as putting at stake the principle of self-election. However, a more legal analysis shows that the principle of self-election is an application of functional duality, whereby, in the absence of an international authority entrusted with drawing up the list of developing countries, each state can exercise this authority by acting itself. The principle of self-election stems from the international law postulate of (State) Recognition.

Flory also summarises the work of Moroccan lawyer Mohammed Bennouna who took a different methodological approach from that of Benchikh. For Bennouna "methodology is not neutral", rather, "it is the result of ideological postulates and of certain conceptions of these very social relationships which it sets out to explain and to clarify".⁷⁵ Bennouna thus states his aim to use any useful approach, be it Marxist, structuralist, dialectic or functional.

Bennouna also arrives at different conclusions from Benchikh.⁸⁰ He sees as a failure, by and large, the efforts of the international law of development to promote a new international economic order (NIEO). In his final analysis, he sees the international law of development as a tool of adaptation of international law to new

and P. Slinn (ed.), *International Law of Development: Comparative Perspectives*, Abingdon, Professional Books Limited, 1987, pp. 11-26.

⁷⁵ F. Snyder and P. Slinn (ed.), *International Law of Development: Comparative Perspectives*, Abingdon, Professional Books, 1987, p. 14.

economic purposes. Bennouna sees a legal technique, called the duality of norms, which is central to the international law of development as an instrument used for the benefit of economic development. He notes that the Generalised System of Preferences (GSP) was originally conceived as a "possible and temporary derogation to the rules of GATT" that is, as an exception to a rule. However, as he notes, The Tokyo Round in 1979, changed the legal nature of the GSP by introducing an enabling clause which provided a permanent and legal basis for the GSP, albeit without granting it a status equal to that of the principle of non-discrimination.

2.5 Dearth of Literature

In Britain, it would appear that the subject of international development law was all but ignored, or at worst, dismissed. By the 1990s by which time the subject was well established, if controversial, in France, there was no adequate reference book or manual or handbook on the subject in English.

There are very few exceptions to this vacuum of work on the subject of international development law in English. One such exception was the work of Slinn at the School of Oriental and African Studies.

In the United States, García-Amador wrote *The Emerging International Law of Development: A New Dimension of International Economic Law*, published first in Spanish in 1987 and then published in English in 1990.⁸¹ His work considers various

⁸⁰ Ibid p.14-16.

⁸¹ F.V., García-Amador, *The Emerging International Law of Development: A New Dimension of International Economic Law*, New York/London, Oceana, 1990.

issues: State sovereignty over natural resources; the right to development assistance; the right to non-reciprocal tariff preferences; and the duty to cooperate for development; duality of norms; non-discrimination; equality; sources of international development law (mainly declarations and resolutions). He centres his study mainly on United Nations practice. "International law of development" he concludes, "...the legal status of its components varies widely, ranging from well-established principles (and norms) of international law, via their extension and development; to norms which are not yet established or recognised *de lege lata*."

More recently, some textbook authors have included the subject of international development law. For example, Qureshi and Ziegler writing on "International Economic Law" devote a chapter to "International development law".⁸² They identified five frameworks under which legal aspects of international development have been treated. Firstly there is the co-operative or facilitative framework. This includes development assistance; technology transfer; commodity arrangements and preferential treatment in trade. Secondly, there is the intergrationist framework. This includes the facilitation of the full participation and inclusion of development and developing countries in the international economy. Thirdly, the communal frameworks with the aim of sharing the resources that are common to mankind, for example the deep sea bed, among the entire international community. Fourthly, the regulatory framework aimed at setting the structure and standards within domestic economies so as to ensure development. Fifthly, rights and responsibilities resting on both developed and developing countries with regard to protection of foreign investment; regulation of foreign investment and multinational corporations, economic

⁸² A.H., Qureshi and A., Ziegler *International Economic Law*, 2nd edn., London, Sweet and Maxwell, 2007.

sovereignty and sustainable development. Under each of these frameworks identified by Qureshi and Ziegler, the general approach has been the enumeration of what the rules are, or what they should be and have been confined to the economic law aspects of development law, neglecting for example the human rights and environmental law dimensions. What has been neglected is the legal nature of these rules and norms. Whenever the question of the nature of the norms under study has been addressed the studies have been confined mainly to a positivist approach.

2.6 "Aspects of the International Law of Development" Symposium

One attempt that was made to remedy this vacuum was an Anglo-French Symposium on "Aspects of the International Law of Development", held under the umbrella of the Cultural Department of the French Embassy in London from January 11 to 13, 1985.⁸³ The symposium was the result of a joint initiative taken by Roselyn Higgins (Professor, London School of Economics), Dr Francis Snyder (University of Warwick), Professor Alain Pellet (University of Paris-Nord) and Gilles Chouraqui (cultural counsellor to the French embassy, London).

The aim of the symposium was to bring together scholars from the Anglophone and francophone legal traditions with the objective of exploring the theory and practice of the law of development.⁸⁴ Bringing together scholars in this way was prompted by the observation that whilst the subject of development law had received detailed elaboration by francophone scholars, British international lawyers had tended to treat

⁸³ F., Snyder, and P., Slinn, (ed.), *International Law of Development: Comparative Perspectives*, Abingdon, Professional Books, 1987.

⁸⁴ *Ibid* p. 1.

development questions merely as an aspect of international economic law. Similarly, British legal scholars interested in development questions as such had tended to be more concerned with questions of domestic law. The objective of the symposium therefore, was to identify and explore the similarities and differences of approach from the two traditions of legal scholarship: one often called British pragmatism, concerned with emphasising the binding and enforceable nature of international legal rules as "value-free" norms; the other, more theoretical French tradition, concerned with developing a conception of international law as an important tool in the dynamic of political, economic and social change.

A comprehensive survey of the subject of international development law, including a historical account from its inception, how it evolved, and the various aspects of it that have been tackled would require a separate lengthy text. Instead, I focus here, for the purposes of this thesis, on the main approaches (and some of the main themes and debates), expertly presented at the 1985 symposium. Subsequent studies, a few examples of which I will give below can be categorised into one or more of these approaches:

Maurice Flory's contribution was titled "*A North-South Dialogue: The International Law of Development*".⁸⁵ Flory identified the two major approaches in the field and was a good summary of the fissures in development law up to the time of the Conference. Firstly, there are those that saw the international law of development in the context of international law captured or controlled by the dominant powers (e.g. Benchikh and Bennouna above). Secondly, there are those that saw the international law of development as an instrument of destabilisation in international law.

The latter approach saw international law of development as an instrument of destabilisation in international law.⁸⁵ This approach faithful to the positivist school, is more concerned with the technical quality of the instrument which constitutes the normative structure of international law, more than the concrete content of the various norms which make up this structure. Those following this approach would agree that in order to carry out a good policy, States need a good law, that is, an instrument that is technically adapted to the ends which they want to achieve. However each one must remain in his own field with lawyers remaining outside the political or economic debate. In this way the law runs no risk of being compromised. The concern is that law is not turned into a "fighting weapon" serving political ambitions which are fundamentally in contradiction with the functions of regulation and co-operation inherent in international law.⁸⁷ According to this view, there are no degrees of lawfulness. One can therefore not speak of the specificity of an international law of development.⁸⁸ Whilst it may be difficult to always draw the boundary between the pre-legal and the legal, the threshold does exist. Beyond this boundary, a legal obligation is born which can be advanced before a judge or an arbitrator, and the non-respect of which constitutes an act giving rise to an international obligation; before this threshold, there is none of this.⁸⁹

⁸⁵ *ibid* pp.11-26.

⁸⁶ M., Flory, 'A North-South Legal Dialogue: The International Law of Development' in F., Snyder, and P., Slinn, (ed.), *International Law of Development: Comparative Perspectives*, Abingdon, Professional Books, 1987 pp.19-20. A good example of this approach cited by Flory, is Prosper Weil's article: P. Weil, 'Towards Relative Normativity in International Law', *American Journal of International Law*, vol.77, 1983, pp. 413-442.

⁸⁷ M., Flory, 'A North-South Legal Dialogue: The International Law of Development' in F., Snyder, and P., Slinn, (ed.), *International Law of Development: Comparative Perspectives*, Abingdon, Professional Books, 1987, p.19.

⁸⁸ *ibid*.

⁸⁹ P. Weil, 'Towards Relative Normativity in International Law', *American Journal of International*

A third approach, perhaps less critical approach, is to view the international law of development as an instrument for adapting international law to new economic purposes. This view does not believe that the law is purely an instrument of technique. Nonetheless, the quality of the legal norm is important. This approach recognises that, whilst, international law has always had as its object peaceful relations between States, the demands of the present international society are wider and include an economic and social dimension. The international law of development is thus seen as representing new tools, new concepts, to serve a new purpose. What starts as a resolution defining an objective agreement, can end up in substantive law.

The main themes covered by the conference are as follows:

First, there is the role of developing countries in promulgating norms of development law. Peter Slinn in his analysis of "Differing Approaches to the Relationships between International Law and Development", contrasts the French and British approaches to the study of international law with particular regard to development law.⁹⁰ According to Slinn as today's "soft law" may be tomorrow's "hard law", all international lawyers would do well to pay more attention to the contribution being made by developing countries to the development of international law.

Another theme is how development law should be considered within the general structure of international law. A.N. Allott discusses the sources of international development law in "The Law of Development and the Development of Law".⁹¹

Law, vol.77, 1983, p. 417.

⁹⁰ F.Snyder and P. Slinn (ed.), *International Law of Development: Comparative Perspectives*, Abingdon, Professional Books, 1987, pp.27-39.

⁹¹ Ibid pp. 69-86.

Allott's aim is to identify the juristic nature of international development law in the framework of general legal theory, with particular attention paid to the sources of law and the nature of norms. Allott distinguishes between policies, principles and rules as different levels of norms, and suggests that the best possibility for the elaboration of an international law of development lies in individual initiatives or in collective State action.

Hazel Fox identifies another potential source of the international law of development in "The Significance of the Distinction between Public and Private Law for Developing States."⁹² She argues that this distinction provides a variety of legal instruments.

These instruments include the concept of sovereignty, and private law instruments such as property and contract, which may be utilised as needed by national governments.

Mohammed Bedjaoui discusses other potential sources of international development law in "Some Unorthodox Reflections on the Right to Development".⁹³ He places particular emphasis on the right of peoples to self-determination and to international solidarity. He argues that underdevelopment is a structural circumstance which requires going beyond duality of norms. He argues for the need for the recognition of the right to development as an integral part of State sovereignty.

Guy Feuer discusses the "The Role of Resolutions in the Formation of General Rules of International Law of Development."⁹⁴ Feuer argues that resolutions may lead gradually to binding legal rules, although this does not always happen. He favours an evolutionist conception of the elaboration of the international law of development whereby the focus is on analysing the ways in which resolutions

⁹² F. Snyder and P. Slinn (ed.), *International Law of Development: Comparative Perspectives*, Abingdon, Professional Books, 1987, pp. 145-151.

⁹³ *Ibid* pp. 87-116.

⁹⁴ *Ibid* pp. 137-143.

become increasingly dense in legal character.

Kabir-ur-Rahman Khan considers the relationship between "International Law of Development and the Law of the GATT".⁹⁵ Khan considers that the tenets of GATT, particularly the principle of reciprocity and the most favoured nation treatment, are opposed to those of the international law of development. He argues that there is no means by which a right to development could be effected through the GATT.

In "The Law of Development and Arbitration Tribunals" Philippe Kahn considers the grounds of arbitral jurisdiction in direct investment contracts and the legal issues raised in such matters as formation of contract and the nature of the obligation.⁹⁶ Kahn contends that arbitrators tend to view developing countries as analogous to non-professionals or consumers and as such requiring special protection. In his analysis of arbitral awards he finds that arbitrators avoid explicit reference to development law.

Another theme is the relationship between development law and human rights. George Kanyeihamba explores "Human Rights and Development with special reference to Africa."⁹⁷ He notes the recognition of a right to development. Peter Muchlinski considers the relationship between "Basic Needs Theory and Development Law".⁹⁸ Muchlinski argues that the basic needs approach to development has the following legal implications: firstly, the individual and the protection of human rights are centrally important, and secondly, a universal international law is required. In his conclusion, however, Muchlinski considers that the basic needs approach adds little to the study of international development law.

⁹⁵ *ibid* pp.175-201.

⁹⁶ *ibid* pp.163-174.

⁹⁷ *ibid* pp.221-236.

⁹⁸ *ibid* pp.237-270.

which he saw as a reformulation of particular aspects of public international law.

Francis Snyder examines the "The European Community's New Food Aid

Legislation".⁹⁹ Snyder notes that the right to food is increasingly proposed as a basic human right. Snyder also notes that despite the increasing posturing of Community food aid policy and law, towards development policy, a number of major questions remain as to whether food aid, in the long run, has a legitimate *raison d'être* and whether food aid can really make a real contribution to development.

Another theme is the view that development law is a form of liberal capitalist ideology. A very critical view of the international law of development, is given by **Monique Chemillier-Gendreau** in "Relations between the Ideology of Development and Development Law".¹⁰⁰ Chemillier-Gendreau argues that the concept of development law is a myth, a form of liberal capitalist ideology and incompatible with concepts in public international law. She argues strongly that the notion of development law be abandoned. In its place, she contends, must be attempts to promote a right to development.

Another theme is the legacy of colonialism. **Jean-Claude Gautron** discusses "The French Contribution to the International Law of Development: A Study of Sources."¹⁰¹ Gautron points out that with regard to relations with former colonies, the French State contributed to the elaboration of the doctrine of State succession, engaged private organisations for public ends and developed specific legal forms and theories with regard to, for example, regulation of agriculture. Use was also made of bilateral agreements, tied aid, minimum proportions of gross national product as public aid.

⁹⁹ *Ibid* pp. 271-305.

¹⁰⁰ *Ibid* pp. 57-66.

preferential commercial agreements and export credits, all of which, according to Gauthron, represent an important contribution to the sources of international development law.

2.7 Legal approaches

The other works that I found particularly useful are as follows:

Schachter examined general 'features' of the international law of development.

According to Schachter one such general feature of the international law of development is the international entitlement to aid and preferences based on need.¹⁰² Schachter submits that this is in fact the central feature of the international law of development. Schachter found this notion expressed or implicit in a range of international decision-making pertaining to development, including those agreements relating to trade preferences, investment and resources; in bilateral and multilateral programs of aid; and in normative resolutions adopted by the United Nations bodies on commodities, industry, the oceans etc. The rationale for international assistance and preferential treatment based on need is in keeping with the premises of the modern welfare State i.e. to provide for the minimal human needs of the most disadvantaged segments of society.¹⁰³ Schachter notes that when the standard of need is adopted as a ground for preference and affirmative actions, it is often extended beyond cases of human suffering. Therefore, there is increased acceptance of the idea that specially disadvantaged countries such as land-locked countries; former colonies or States dependent on a single commodity have special needs. Schachter notes there is a

¹⁰¹ *ibid* pp. 153-160.

¹⁰² O. Schachter, 'The Evolving International Law of Development', *Columbia Journal of Transnational Law*, vol. 15, 1976, pp. 9-12.

¹⁰³ *ibid* p. 10.

widespread practical acceptance of a responsibility on developed States based on the entitlement of those in need.¹⁰⁴ Schachter points to the scale and duration of the response as bearing testament to the practical acceptance of this responsibility. Whilst the demand for aid and preferential treatment is usually made by the developing States, the more affluent developed States by and large, accept these demands. Evidence of this acceptance can be found in the resolutions which the developed States have accepted. Further, acceptance is evidenced by the actual grant of assistance and preferences to the developing States. According to Schachter entitlement on the basis of need is seen as outside fundamental/established legal principles because it is difficult to reconcile need as a basis of entitlement with the legal principle of equality among States. It is also difficult to reconcile entitlement on the basis of need with such principles as nondiscriminatory trade. What is seen is a divergence from these principles.¹⁰⁵ Another line of enquiry identified by Schachter to establish whether the body of international agreements for the benefit of developing countries represent evidence of general principles of law. There is no simple "litmus paper test" but there are indicators that can aid in making the judgment as to whether patterns seen in particular arrangements may be regarded as a general principle, for example, the circumstances leading up to the declaration and the responses after adoption; how many states supported the resolution or declaration and the positions these states take in other situations.¹⁰⁶ Schachter's work is useful in identifying development assistance and preferential treatment for developing states as key features of international development law. Schachter's approach bases development assistance and preferential treatment on the concept of need. However, my approach bases these on

¹⁰⁴ *ibid* pp. 10-11.

¹⁰⁵ *ibid* p. 10.

¹⁰⁶ O. Schachter, 'The Evolving International Law of Development', *Columbia Journal of Transnational Law*, vol. 15, 1976, p. 5.

legal obligations i.e. as primary rules of obligation following Hart's conception.

Kwakwa viewed international development law as a 'new' and emerging area of international law whose sources could be derived from the traditional formulation stipulated in article 38 of the statute of the International Court of Justice (ICJ).¹⁰⁷ Kwakwa identified the following resolutions and declarations noted by a former President of the ICJ, I.Elias, giving content to international development law as law-making resolutions and declarations i.e. as reflecting customary law: Resolution on the Charter of Economic Rights and Duties of States; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States; and The United Nations Covenant on Economic, Social and Cultural Rights.¹⁰⁸ Kwakwa submitted that the practice of providing development assistance through programs known as 'Official Development Assistance' reflects recognition of the substantive inequality of States. Another example of the recognition of the inequality of States according to Kwakwa is the Generalised Preference System (GPS), under which developed States grant preferential and non-reciprocal treatment for developing States which is generally followed. Under a Preferential tariff system, products from developing States are qualified to enter markets of preference giving States at reduced or totally eliminated most favoured nation rates of duty, with the aim of raising the levels of developing countries' foreign exchange earnings, rates of industrialisation, and levels of economic development.

Kwakwa argues that State practice shows that differential treatment of developing

¹⁰⁷ E., Kwakwa, 'Emerging International Development Law and Traditional International Law-Congruence or Cleavage?' *Georgia Journal of International and Comparative Law*, vol. 17, 1987, pp. 431-455.

¹⁰⁸ *Ibid* p. 445.

States is recognised and accepted by the international community and applied by developed States in their relations with developing States.¹⁰⁹ Kwakwa accepts that such an inference of customary law from State practice is controversial, and particularly on the point of lacking *opinio juris*. Kwakwa however, sidesteps this difficulty by asserting that the difficulty with the *opinio juris* requirement is that the first States to adopt a new practice are regarded as acting on the basis that the practice is obligatory before it has become obligatory. A further difficulty with *opinio juris* is that "subjectivities are only ascertainable to an onlooker through overt behaviour and one necessarily relies on conduct to infer the perception of the others."¹¹⁰ Kwakwa thus insists that State practice with regard to preferential treatment is specific, constant and consistent, such that the practice has hardened into a general practice based on the conviction that it is a legally obligatory requirement.¹¹¹ Kwakwa's work is useful particularly in identifying some of the sources of international development law. However, he restricts his analysis to the traditional sources of international development law as enumerated by article 38 of the statute of the international court of justice and particularly focuses on inferring customary practice in the area of international development law. My approach is includes traditional sources of international law as enumerated by article 38 of the statute of the international court of justice but also includes non-traditional sources, in particular resolutions and declarations of international organisations. My approach rather than seeking to infer a custom in the sense of article 38, seeks to identify the norms, rules and principles making the legal structure or legal system of

¹⁰⁹ *ibid* pp. 447-448.

¹¹⁰ O. Schachter, 'Towards A Theory of International Obligation', *Virginia Journal of International Law* vol. 8, 1968, pp.300,313, cited in E., Kwakwa, 'Emerging International Development Law and Traditional International Law-Congruence or Cleavage?' *Georgia Journal of International and Comparative Law*, vol.17, 1987, p. 448.

¹¹¹ E., Kwakwa, 'Emerging International Development Law and Traditional International Law-Congruence or Cleavage?' *Georgia Journal of International and Comparative Law*, vol.17, 1987, p. 448.

international development law.

Another significant work is the collection of works compiled by Sammy Adelman and Abdul Paliwala on 'Law and Crisis in the Third World'.¹¹² The crisis alluded to here is the gap between reality and the two main theories explaining underdevelopment i.e. modernisation theory and dependency theory. To summarise: modernisation theory had as its central tenet the belief that the third world would inevitably develop. Modernisation theory saw the creation of western institutions, for example the rule of law, separation of powers, good governance seen in the main as multi-party politics, as integral to economic development. By this conception, development was seen primarily in economic terms. The problem identified here was that developing countries in pursuing development on the basis of modernisation theory i.e. in largely economic terms, ignored the real root of underdevelopment which often had its site in social relations. As a consequence developing countries did not develop as expected. Dependency theory on the other hand criticised modernisation theory, *inter alia*, for its emphasis on economic development. Dependency theory also criticised modernisation theory's postulate of the inevitability of development, arguing, rather, that underdevelopment is a consequence of the capitalist infiltration of the third world. Dependency theory led to, for example, nationalisation in the third world. However, both dependency theory and modernisation theory did not achieve the development that was sought. Further, neither theory really identified the causes of underdevelopment. It may also be noted that both theories saw calls for a new international economic order as, by and large, futile.

This work does not explicitly consider the concept of international development law but

¹¹² S. Adelman and A. Paliwala (ed.), *Law and Crisis in the Third World*, London, Hans Zell Publishers, 1993.

is useful in understanding the background against which international development law was criticised particularly with regard to dependency theory and with regard to the view that the debate on the NIEO 'died'.

Also important are those works that consider development as a human right. A good example is the work of Baxi.¹¹³ Baxi contrasts development as a human right with development as political 'largesse'. As a human right, the human person is the main participant and beneficiary of development. States have a duty to ensure that their political systems allow for full participation of all. Development as political largesse on the other hand, signifies "a sovereign executive prerogative, the 'rights-free' spaces of executive/elected official dispensation of developmental aid and assistance as the best possible means of distribution of public goods."¹¹⁴ By development as political largesse, states, give development assistance on the basis of charity, rather than on the basis of, for example solidarity or justice. Baxi concludes that, in the main, this distinction probably does not matter to the individuals who are the recipients of development aid. Baxi's work is useful particularly in drawing the link between development and human rights. I will return to this in the Declaratory Law chapter where I consider human rights as the value underlying development goals.

Of particular use were the analytical approaches used by Abbott et al., Yasuaki Onuma, Dorothy Jones, Rosalyn Higgins and L. Chen. Abbott et al.¹¹⁵ apply their concept of legalization to world politics. By using Hart's concept of law as a union of primary rules and secondary rules, Abbott et al., map legalization along the criteria of

¹¹³ U., Baxi, *Development as a Human Right or as Political Largesse? Does it make any difference?* Chennai, Madras Institute of Development Studies, 2006.

¹¹⁴ *Ibid* p.43-44.

obligation, precision and delegation. Along these three criteria we move from non-binding commitments at one end of the spectrum to binding commitments (hard law) at the other end of the spectrum. This is a useful way to gauge legalization and I apply this to international development law. I use the dimensions of obligation, precision and delegation particularly in the Aspirational Law chapter. Onuma's conception of 'aspirational law' was helpful in understanding and conceptualising those provisions in treaties that enumerate international development law. Onuma observed that states enumerate their aspirations in human rights treaties which are not necessarily observed from the outset.¹¹⁵ This lack of 'observance from the outset' can be seen as being due to 'weak' delegation in the sense of Abbott et al. However, enshrining these aspirations in treaties gives them a legitimacy which cannot be denied. Applying Onuma's conception to international development law is helpful in identifying 'aspirational' development law and thus helping us understand a sense in which international development law can be spoken of as true law. Dorothy Jones observed that this type of aspirational law making is a trend that started particularly after the second world war and calls the principles that states have articulated in this way, 'declaratory law'.¹¹⁷ Applying Dorothy Jones' approach to international development law is helpful in identifying those principles that States have repeatedly articulated in resolutions, declarations, charters and conferences, as guiding their behaviour in the area of development. Higgins¹¹⁸ and Chen¹¹⁹ provide a very useful reference for the

¹¹⁵ K.W. Abbott et al., 'The Concept of Legalization', *International Organization* vol. 54, no. 3, 2000.
¹¹⁶ Y. Onuma, 'International Law in and with International Politics: The Functions of International Law in International Society', *European Journal of International Law*, vol. 14, no. 1, 2003, pp. 105-139.

¹¹⁷ D.V. Jones, 'The Declaratory Tradition in Modern International Law', in T. Nardin and D.R. Mapel (ed.), *Traditions of International Ethics*, Cambridge, Cambridge University Press, 1992, p. 42.

¹¹⁸ R. Higgins, *Problems and Process, International Law and How We Use It*, New York, Oxford University Press, 1996.

¹¹⁹ L. Chen, *An Introduction To Contemporary International Law-A Policy-Oriented Perspective*, 2nd edn., New Haven, Yale University Press, 2000.

legal process understanding of law. Higgins provides a justification for why 'legal process' qualifies as law (I return to this in the Methods chapter). Chen provides criteria or the various aspects of legal process. I found the legal process understanding of 'participants', 'outcomes' and 'adjudicatory arenas of authority' particularly useful in conceptualising international development law under this frame of understanding (I return to these aspects of the legal process in the Methods chapter).

2.8 Conclusion

The notion of an international law of development has evolved, particularly in substance. Some of the issues raised by the French literature as encompassing the subject matter of international development law are not evident in contemporary international instruments. A good example of an issue that is no longer prominent is nationalisation following the end of colonialism (Feuer highlighted this as an issue of international development law in the francophone literature). However, the majority of the issues raised are still relevant today. A system of preferences for developing countries particularly in the area of international trade now has permanent legal basis in the WTO. In the literature reviewed, an example is Benchikh's work which ignored the now permanent legal basis of the Generalised System of Preferences in the WTO. The WTO agreements all include several special provisions for differential treatment of developing countries. The status of these special and differential treatment provisions and efforts to make them more effective for the benefit of developing countries is currently being debated in the Doha round of negotiations in the WTO.

The status of United Nations resolutions is still a key issue in the context of international development law. An example in the literature is Feuer who argued that

resolutions may lead gradually to binding legal rules, although this does not always happen. Feuer favoured an evolutionist conception of the elaboration of the international law of development whereby the focus is on analysing the ways in which resolutions become increasingly dense in legal character. Significant 'new' resolutions have been enacted since the first development resolutions calling for a new international economic order which focused mainly on economic development. These new resolutions include: the Declaration on the Right to Development (1986), Rio Declaration (1992), the Millennium Declaration (2000), the Johannesburg Declaration (2002). These 'new' resolutions include not only economic development but environmental and social development, as well as human rights. I will return to these resolutions particularly in the Declaratory and Legal Process chapters (chapter 5 and chapter 7 respectively). The broader coverage of the content of international development law supports the argument that it is true law that cuts across the whole gambit of relations between developed and developing countries.

There are also multilateral treaties enshrining international development law. Important treaties include those relating to trade (WTO agreements); those relating to the environment (for example the United Nations Framework Convention on Climate Change); and the Food Assistance Convention. These treaties are quite recent in relation to when the arguments for a NIEO were first proposed and need to be appraised in the context of their significance to the subject of international development law. I will return to them in the Aspirational and Hard Development Law chapters (chapters 4 and 6 respectively).

There is also the continued relevance of development assistance. There is technical assistance, transfers of technology and financial assistance. An example in the literature is Qureshi and Ziegler's work which identifies development assistance and technology transfer as important aspects of international development law. Similarly,

Schachter identified international entitlement to aid as a central feature of international development law. Kwakwa saw the practice of providing development assistance through 'official development assistance' as reflecting a recognition of the substantive inequality of States. Today, development assistance cuts across the whole gambit of relations between developing and developed countries, as the analytical chapters that follow will show (Aspirational Law, Declaratory Law, Hard Development Law and Legal Process chapters).

Although the content of international development law is evolving, the central tenet of differential treatment between developing and developed countries has remained relatively static. This is really the feature that marks out international development law as a specific law that defines the rights and obligations of developing and developed countries vis-à-vis each other. The literature identified this as 'duality of norms' (for example Benchikh and Bennouna). Kwakwa inferred custom in the observation of differential treatment of developing States and the recognition and acceptance of this, by the international community and application by developed States. Today, differential treatment is seen in all aspects of trade in the WTO (the Aspirational Law and Hard Development Law chapters highlight examples), but also in other areas, particularly the environment (the Legal Process chapter highlights this).

International Development Law today, can be seen in consensual international instruments. Certainly, at its advent, the subject of international development law and the NIEO debate from which it arose, was a call led mainly by developing countries, to change the international economic order. Indeed this was the basis of the critical approach to international development law identified by the "Aspects of the International Law of Development" symposium. This critical approach saw the

international law of development as a fighting weapon cloaked in 'law', wielded by developing countries to meet their own political ends. Today, the various instruments, particularly conference outcome documents and treaties, are consensual documents reflecting carefully negotiated text between developing and developed countries. The analytical chapters that follow show this.

The criticisms identified in the literature against international development law are now difficult to sustain. The earlier criticism that the granting of preferences then proposed by international law of development was in contradiction with the basic tenets of GATT (reciprocity and non-discrimination) needs to be qualified in light of the now permanent legal basis for the granting of preferences in the WTO.

Another criticism stemmed from a conception of international development law as a tool for promoting or bringing about a new international economic order. This conception ignored the normative structure of international development law. An economic analysis was employed and arrived at the conclusion that the international law of development would not bring about development but rather would embed the existing system of underdevelopment of the developing countries (for example **Benchikh**). Whilst this argument may have merit in economic terms, I conceive of international development law differently. International development law has a normative structure, with existing and evolving norms, principles and rules, and thus amenable to a purely legal analysis.

This thesis takes a different approach to the question of the legal validity of international development law. One approach taken in the literature was to analyse international development law in light of traditional international law postulates, for example sovereignty and equality of states (for example **Schachter**). Another approach taken was to analyse international development law within the traditional

sources of international law as enumerated by Article 38 of the statute of the international court of justice (for example Kwakwa, Allott). These approaches offer helpful insights into how international development law fits into traditional conceptions of international law. However, they do not make clear the underlying assumptions of the legal basis of these postulates and sources. This thesis takes, as its starting point, a clarification of the legal basis on which the criteria utilised in the analytical chapters (Aspirational Law, Declaratory Law, Hard Development Law and Legal Process chapters) stems from.

This approach should give a clearer understanding of the different bases and varying status of international development law by beginning from the very basic and fundamental question: what is law? In particular what stands as international law? It is to this question that I now turn in the next chapter (Method-Legal Concepts and International Law).

CHAPTER 3:

METHOD-LEGAL CONCEPTS AND INTERNATIONAL LAW

3.1 Introduction

This chapter addresses the question of the basis of law and what 'true law' consists of. To understand whether development law is law, we need first to understand what stands as law, and in particular what stands as international law. There are different traditions of legal understanding. Here, consideration will be given to what stands as law in the positivist tradition, in the natural law or aspirational law tradition, and in the more recent tradition of legal process. Put another way, each of these three traditions addresses the question of the basis of law and what 'true law' consists of, or 'legal validity'. Each of the three traditions is coherent and establishes signaling criteria that delimits what is included in true law. Each tradition is also the site of particular phenomenon important in the production of a legal structure: positivism is often the site of rules; natural law enunciates norms and principles and legal process encompasses norms, principles and also rules.

Each of positivism, natural law and legal process will be taken in turn. For each tradition, an overview of the main tenets will be given. The focus will mainly be on those that address the issue of legal validity. I will then proceed to identifying criteria of what stands as law in each tradition. The criteria will be applied to international development law in the analytical chapters (Aspirational Law, Declaratory Law, Hard Development Law and Legal Process chapters).

3.2 Positivism

In the positivist tradition, international law is regarded as a unified system of rules that according to most variants emanate from State will.¹²⁰ State will or voluntarism follows in the tradition of Hobbes, 'auctoritas non veritas facit legem', expressing the idea that positive law is juridically valid not by its content, but rather on the grounds of the public authority standing behind it. According to this tradition, law is equated with the will of the law-maker. The law-maker decides the content and legal character of norms. In the context of international law, States thus create international legal norms by reaching consent on the content of a rule. It was along these lines that the Permanent Court of International Justice (PCIJ) stated in the Lotus judgment: "International Law governs relations between independent States. The rules binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing common aims. Restrictions upon the independence of States cannot therefore be presumed."¹²¹

State will or voluntarism as the basis of law is defended on the ground that States are "free-agents", "autonomous", "sovereign", and can therefore only be obligated through their voluntary submission and agreement. The presupposition here is that States are moral beings analogous to persons, capable of holding rights just as individuals hold rights.¹²² Voluntarism is also defended on the basis of the principle of *pacta sunt servanda*, agreements are binding, or agreements must be carried out. States are

¹²⁰ A. Slaughter et al., 'Appraising the Methods of International Law: A Prospectus for Readers' *American Journal of International Law*, vol. 93, 1999, p. 364.

¹²¹ *The Case of the SS Lotus (France v Turkey)* 1927 PCIJ Series A No 10.

¹²² F.R. Teson, 'Interdependence, Consent and the Basis of International Obligation', *American*

bound by their promises because they choose freely, having a choice, and being aware of the consequences of their choice i.e. they are morally autonomous.¹²³

In the positivist tradition, law is seen as an objective reality that needs to be distinguished from law as it should be. According to this view, law as 'it is' must be distinguished from nonlegal factors such as natural reason, moral principles or politics. This view finds its roots in David Hume's famous 'A Treatise of Human Nature'. Hume argued that people invariably slipped between describing that the world 'is' a certain way to saying therefore we 'ought' to conclude on a particular course of action. Hume argued that as a matter of pure logic, one cannot conclude that we 'ought' to do something merely because something 'is' the case. The questions seeking to analyse and criticise the way the world is, and those normative and evaluative 'ought' questions are to be treated strictly separately.

Applied to international law, this type of approach reached its climax with Kelsen's 'Pure Theory of Law'. Kelsen drew upon Immanuel Kant's theory of knowledge. For Kant knowledge depended on the categories and concepts imposed by human beings themselves and was not merely an aggregate of sense impressions. Kelsen applied this to the analysis of legal systems. Law, Kelsen contended, was to be analysed only by reference to its constituent elements. It was to be defined entirely in terms of itself. Any external considerations, for example justice, were to be eschewed from the definition of law. Politics, History, Sociology etc, were all excised from Law.¹²⁴

Society of International Law Proceedings, Vol. 83, 1989, p. 561.

¹²³ *Ibid* p. 563.

¹²⁴ M.N.Shaw, *International Law*, Cambridge University Press, 2003 p. 49. Also J.O'Brien, *International Law* Cavendish Publishing, Newport, Australia, 2002, p. 47.

The foregoing views of law demand rigorous tests for legal validity. Legal validity determines whether a proposition belongs to a legal system or not. For positivists such as Kelsen, the question of whether a norm is legally valid or not, is answered with a clear yes or no. A proposition is not legally valid to a greater or lesser extent. The proposition cannot be more or less law. There are no varying degrees of legal validity. The proposition simply belongs to the legal system in question or it does not.

The basis of legal validity can be categorised as two-fold. Firstly, it can be based on another legal proposition superior in rank. This superior proposition is based on a prior proposition and the process continues until one reaches the basic proposition or norm, the *Grundnorm*, of the legal system. Hans Kelsen put forward this approach in his 'Pure Theory of Law'. As noted above, for Kelsen, political, social or economic elements were irrelevant to the question of legal validity. According to the Pure Theory of Law, the *Grundnorm* is the foundation of the legal structure. Propositions that can be related back to it are hence valid legal propositions. For Kelsen the *Grundnorm* of international law is the rule that identifies custom as the source of law.¹²⁵ One such key rule is *pacta sunt servanda*, agreements must be kept. On *pacta sunt servanda* is founded the network of norms from conventions and treaties, and on this is founded rules established by bodies set up by conventions and treaties, for example the decisions of the International Court of Justice.¹²⁶ Secondly, for positivists, legal validity can also be based on a 'rule of recognition' according H.L.A.Hart's 'Concept of Law'.¹²⁷ A rule of recognition is a rule for conclusive identification of primary rules of obligation. It specifies some feature or features, possession of which is taken as conclusive

¹²⁵ H. Kelsen, *General Theory of Law and State*, Vol.1, The Lawbook Exchange Ltd, 1945, pp. 369-70.

¹²⁶ *ibid.*

¹²⁷ H.L.A. Hart, *The Concept of Law*, 2nd edition, Oxford, Clarendon Press, 1994.

affirmative indication that it is a rule of the group to be supported by the social pressure it exerts, it operates to identify a given rule as possessing the required feature of being an item on an authoritative list of rules forming the basis of the idea of legal validity. Where a rule of recognition is accepted, private persons and officials are provided with authoritative criteria for identifying primary rules of obligation.¹²⁸

The test of legal validity on the basis of a rule of recognition, may take any huge number of forms, simple or complex.¹²⁹ For example, reference to an authoritative text; to legislative enactment; to customary practice; to past judicial decisions in particular cases.¹³⁰ In modern legal systems, with its variety of sources of law, the rule of recognition is correspondingly more complex. The criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature and judicial precedents. Provision is usually made for possible conflict by ranking these criteria in an order of relative subordination and primacy.¹³¹ The existence of such a complex rule of recognition with this hierarchical ordering of distinct criteria is manifested in the general practice of identifying the rules by such criteria. The rule of recognition is usually not stated (courts may sometimes announce in general terms the supremacy of one source of law over another). The rule of recognition however is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers.¹³² A rule is thus valid if it passes all the tests provided by the rule of recognition and so as a rule of the system.¹³³ To assert the

¹²⁸ *ibid* p. 100.

¹²⁹ *ibid* p. 94.

¹³⁰ *ibid*.

¹³¹ *ibid* p. 101.

¹³² *ibid* p. 101.

¹³³ *ibid* p. 103. Further there is no necessary connection between the validity of a rule and its efficacy i.e. the fact that a rule of law which requires certain behaviour is obeyed more often than not—unless the rule of recognition includes among its criteria that no rule is to count as a

validity of a rule is to predict that it will be enforced by courts or some other official action taken.¹³⁴

According to Hart, Law is a union of primary rules of obligation, with secondary rules. Secondary rules supplement the primary rules. Primary rules are concerned with the actions that individuals must or must not do. Secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined. Hart called these secondary rules, the rule of recognition; the rule of change; and the rule of adjudication.

A rule of change in its simplest form empowers individuals or a body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules. Rules of change may be very simple or very complex, powers conferred may be unrestricted or limited in various ways; rules may besides specifying persons who are to legislate, define in more or less rigid terms the procedure to be followed in legislation.

A rule of adjudication empowers individuals to make authoritative determinations of the question whether on a particular occasion, a primary rule has been broken. In addition to identifying the individuals who are to adjudicate, such rules also define the procedure to be followed. These rules confer judicial powers and a special status on judicial declarations about the breach of obligations. Rules of adjudication are necessarily also committed to a rule of recognition of an elementary and imperfect sort i.e. if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules

rule of the system if it has long ceased to be efficacious.

¹³⁴ Ibid p.104. Hart put forward what he called the 'proper perspective' of this predictive theory.

are.

As regards international law, Hart felt that international law lacked not only the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying sources of law and providing general criteria for the identification of its rules.¹³⁵ International Law was seen as lacking an international legislature, courts with compulsory jurisdiction, and centrally organised sanctions. This according to Hart resembled a simple form of social structure, consisting only of primary rules of obligation.¹³⁶

Hart however emphasised that this was the case only with regard to the *form*, rather than the *content* of international law.¹³⁷ Hart contended that the question to be asked was whether, such rules as these can be meaningfully and truthfully ever be said to give rise to obligations. He observed that the absence of centrally organised sanctions was the source of doubt on this point.¹³⁸ However, Hart rejected limiting the normative idea of obligation to rules supported by organised sanctions.¹³⁹ What is required is that the rules are thought and spoken of as obligatory; there is general pressure for conformity to the rules; claims and admissions are based on them and their breach is held to justify not only insistent demands for compensation, but reprisals and counter-measures.¹⁴⁰ Hart criticised "Voluntarist", or theories of 'auto-limitation' i.e. those theories that treated all international obligations as self-imposed like the obligation that arises from a promise. He said that it was true that every specific action which a given

¹³⁵ *ibid* p. 214.

¹³⁶ *ibid* p. 214.

¹³⁷ *ibid* p. 232.

¹³⁸ *ibid* p. 217.

¹³⁹ *ibid* p. 218.

¹⁴⁰ H.L.A. Hart, *The Concept of Law*, 2nd edition, Oxford, Clarendon Press, 1994, p. 220.

State was bound to do might in theory derive its obligatory character from a promise;¹⁴¹ none the less this could only be the case if the *rule* that promises to create obligations is applicable to the state independently of any promise. In any society, whether composed of individuals or states, what is necessary and sufficient, in order that the words of a promise, agreement, or treaty should give rise to obligations, is that the rules providing for this and specifying a procedure for these self-binding operations should be generally, though need not be universally, acknowledged. Where they are acknowledged the individual or state who wittingly uses these procedures is bound thereby, whether he or it chooses to be bound or not.¹⁴² An example of this is the now universal acceptance of the prohibition against genocide in international law. A State cannot 'choose' to exempt itself from this prohibition.

These rigorous tests of legal validity imply that international law derives its pedigree from one of the 'traditional' sources. Article 38 of the Statute of the International Court of Justice is widely recognised and accepted as enumerating the traditional sources of international law.¹⁴³ Article 38(1) of the Statute provides that: the Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This wide recognition

¹⁴¹ *Ibid* p. 224.

¹⁴² *Ibid* p. 225.

¹⁴³ M. N. Shaw, *International Law*, Cambridge University Press, 2003 p 49. Also J. O'Brien, *International Law* Cavendish Publishing, Newport, Australia, 2002, p. 66.

and acceptance is due to the fact that according to Article 38, the international court must, decide disputes submitted to it 'in accordance with international law'. Further, all member States of the United Nations are ipso facto, parties to the Statute by virtue of article 93 of the United Nations Charter. This consolidates the universal perception of Article 38 as enumerating the sources of international law.¹⁴⁴

However, the list of sources enumerated in Article 38 is not exhaustive. Firstly, the drafting history of this article does not show an intention that the list be exhaustive. The drafters had been influenced by the practice in some civil law jurisdictions where judges were entitled to resort to general principles in situations where a code did not provide clear guidance. Secondly, there are a number of sources not listed in Article 38 that the International Court of Justice and its predecessor the Permanent Court of International Justice have been prepared to consider. Further as Higgins argues, to say that international law is to be defined only by that which the ICJ will apply in a given case, is too narrow an interpretation.¹⁴⁵ According to Higgins International Law must be identified by reference to what the actors-most often States-believe to be normative in their relations with each other, often, without benefit of pronouncements by the International Court of Justice. One such additional source, and that is pertinent to this research, are the resolutions of international organisations particularly those of the United Nations and those of the World Trade Organisation. Firstly, resolutions are very often framed in juridical terms of obligations and rights, which cannot simply be ignored. Secondly, and perhaps more crucially, these resolutions are relied upon by governments as expressing agreed law and relied upon in disputes. This was the case

¹⁴⁴ M.N. Shaw, *International Law*, Cambridge University Press, 2003 p. 49. Also J.O'Brien, *International Law* Cavendish Publishing, Newport, Australia. 2002, p. 67.

¹⁴⁵ R.Higgins. *Problems and Process, International Law and How We Use It*, New York, Oxford University Press, 1996, p. 18.

for example in the *Fisheries Jurisdiction Case of 1974*,¹⁴⁶ and in the *Western Sahara*¹⁴⁷ case. Thirdly, the last generation has seen a tremendous increase in international organisations and a corresponding network of rules and regulations with varying legal effects.¹⁴⁸ Given this reality in the international legal system, notions of contract or consent as the basis of obligation in international law are difficult to defend or at least must be qualified. It has been argued that the basis of legal obligation especially as far as international organisations are concerned is consensus.¹⁴⁹ Consensus indicates a continuum between simple majority agreement and unanimous shared beliefs.¹⁵⁰

Resolutions can have the status of being interpretations of existing law. They can affirm, clarify or elaborate existing obligations. For example authoritative treaty interpretations have obligatory force similar to that of the treaty itself. In order for the interpretation to be so obligatory and binding, there must be a general acceptance that this is the case. This view is endorsed by leading authorities. For example, Professor Oscar Schachter speaking of General Assembly resolutions contends that "... an interpretation receiving *general approval* will be authoritative and binding."¹⁵¹ Similarly, Professor Grigory I. Tunkin also concludes that 'if an interpretation of the Charter given by a particular United Nations organ is *generally acceptable* it acquires binding

¹⁴⁶ *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland) (Merits, Judgment)* [1974] ICJ Rep 3.

¹⁴⁷ *Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (Merits, Judgment)* [1974] ICJ Rep 17.

¹⁴⁸ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.

¹⁴⁹ M.N. Shaw, *International Law*, Cambridge University Press, 2003 p 49. Also J.O'Brien, *International Law* Cavendish Publishing, Newport, Australia, 2002, p. 10.

¹⁵⁰ J. Wilfred "Unanimity, The Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organisations," in R.Y. Jennings et al. *Cambridge Essays in International Law: essays in honour of Lord McNair*, London, Stevens and Sons, 1965.

¹⁵¹ H. McClosky, 'Consensus and Ideology in American Politics', *American Political Science Review*, vol. 63, 1964, pp. 361, 363.

¹⁵² O. Schachter, 'The Relation of Law, Politics and Action in the United Nations', *Recueil des Cours*, 109, 1963-II, p.186.

force.¹⁵²

The issue then is what is to be construed as *general acceptance* or *general approval*.

The voting pattern and history here is indispensable in assessing the general acceptance and general approval of the resolution. A unanimous or near unanimous vote establishes an almost conclusive presumption that the interpretation was generally acceptable and therefore binding. This presumption can only be rebutted by a clear indication that it was rejected in subsequent practice. Interpretations receiving less than unanimous support still carry evidentiary value to be taken into account together with other factors. The weight of such interpretations would diminish with a declining majority.

The criteria for assessing the status of resolutions can be summarised as follows:¹⁵³

Firstly, the *nature and content* of the resolution. The nature and content includes an examination of whether it is a decision, a declaration or a recommendation. The substantive content and not just the title of the resolution is important in making this examination.

Secondly and related to the nature and content of the resolution is its *intent and terms*.

The terms of the resolution reveal the language used, whether mandatory or hortatory.

The wording also reveals whether the resolution purports to declare existing legal principles, whether it interprets treaties, affirms obligations or makes determinations of law. The terms of the resolution may also expressly or impliedly state the intention of the parties. The intention will also be ascertained from explanations of vote and the

¹⁵² G.I. Tunkin, *Theory of International Law*, Harvard University Press, 1974, p. 171.

¹⁵³ B. Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)', *British Yearbook of International Law*, Vol. 58, No. 1, 1988, pp. 129-131, has given a more detailed description of each of these criteria.

circumstances surrounding the adoption of the resolution, from statements in the debate and from explanations by sponsors.

A third and important factor is the *voting pattern or degree of support of a resolution*.

This factor is important in relation to the weight to be given to the resolution.

Resolutions adopted with a unanimous or near unanimous vote, or by consensus have considerable weight as declarations of law, or treaty interpretations. The weight to be given in respect of the votes is influenced by the level of support from States from all legal and economic systems and those whose support may be necessary for effective implementation. Abstentions as a general rule are treated as acquiescence.

Fourth, is the *implementation procedure* provided for the follow-up, observation and control of a resolution. An important influence putting in place implementation procedures is the giving rise of expectations. Implementation procedures include the calling for reports from member States and the establishment of committees charged with the follow-up and implementation of the resolution. In addition implementation procedures via political organs, judicial decisions particularly, International Court of Justice pronouncements, are an important factor. For example in the *Namibia case*, General Assembly resolutions were supported by the International Court of Justice. The International Court of Justice has also lent its support to principles in the Universal Declaration of Human Rights, the Friendly Relations Declaration and the Declaration on Decolonisation.

Fifth, '*teachings of the most highly qualified publicists of the various nations*' in the words of Article 38(1)(d) of the ICJ Statute is also a factor. A convergence of views on the status of a particular resolution goes towards the weight of that resolution as a declaration of law or treaty interpretation.

The foregoing tell us something about the sources of international development law.

Firstly, we can look to the traditional sources of international law as conceived by Article 38 of the Statute of the International Court of Justice. Secondly, we can look at the many resolutions for evidence of existing law.

3.3 Natural Law and Aspirational Law

Apart from established law (*lex lata*) there is also emerging law (*in statu nascendi*), as well as *de lege ferenda*, that is, the law which is being sought to establish, the law as it ought to be.¹⁵² An example of emerging law in the international realm is aspirational law. The notion of an aspirational law has recently been elaborated by Professor Onuma, a prominent Japanese international lawyer.¹⁵⁵ According to Onuma aspirational law embodies global aspirations shared by the overwhelming majority of members of the international community. Thus, goals are at the core of aspirational law. States communicate to their peers in the most solemn way possible their intentions to work towards certain common goals. Aspirational law might not necessarily be observed from the outset in a strict manner. However, framing aspirations as law, gives them a dignity, legitimacy and authority that no member of the international community can openly deny. As such, there is convergence, if not strict observance, of the behavior of diverse members of the international community over a period of time.¹⁵⁶

According to Onuma, a genuine aspirational law will be marked by three criteria.¹⁵⁷

First, the norm will be present in domestic society, and will regulate the conduct of its

¹⁵² J.P. Grant, *Perry and Grant Encyclopaedic Dictionary of International Law*, Oceana Publications, 2005, p.214.

¹⁵⁵ Y. Onuma, 'International Law in and with International Politics: The Functions of International Law in International Society', *European Journal of International Law*, vol.14, 2003, pp. 105-140.

¹⁵⁶ Cornelia Navari, *Memorandum of an Interview with Professor Yasuaki Onuma*, London, 30 October 2010.

members. Second, at the international level, the expressed goal will be one that is sincerely desired by government or a section of government. Finally, and more importantly, subsequent legal processes will demonstrate a movement towards that goal. Philip Harvey has argued convincingly that if law consists of the rules by which a society regulates the conduct of its members and collective institutions, then aspirational law is true law.¹⁵⁸ Aspirational law is a kind of law by means of which societies 'legislate' goals for themselves.¹⁵⁹ It can regulate and direct the actions of members of society as surely as legal rights do. Although usually lacking in enforcement, over time this is remedied. Even though aspirational law may not be honoured in practice, the goal-setters challenge themselves to live up to their own aspirations and pre-authorise actions, with the aim of bringing their actions into compliance with their aspirations.¹⁶⁰

It is the characteristic of a true aspirational law that it should show a movement to hard law, along the criteria established by Abbott et al. i.e. along the criteria of obligation, precision and delegation.¹⁶¹ By this criteria, the obligation may be contingent, contain an escape clause or be hortatory. The obligation must be precise. Delegation is usually moderate to low and is mainly administrative or operational in nature as opposed to strong delegation which is usually in the form of judicial or quasi-judicial authority. Delegation can take the form of mediation, conciliation or arbitration. Aspirational law is to be distinguished from *lex ferenda*, or law as it ought to be. Unlike *lex ferenda*, aspirational law fulfils all three criteria of obligation, precision and delegation. *Lex*

¹⁵⁷ *ibid.*

¹⁵⁸ P. Harvey, 'Aspirational Law', *Buffalo Law Review*, vol. 52, no. 3, p. 719.

¹⁵⁹ *ibid* pp. 717-719.

¹⁶⁰ *ibid* p. 719.

¹⁶¹ K.W., Abbott, et al., 'The Concept of Legalization', *International Organization*, vol. 54, no. 3, 2000, pp. 401-419.

ferenda would not normally have delegation. There is usually no way to implement *lex ferenda*. In short, aspirational law is closer to 'hard law'.

3.4 Natural Law as Declaratory Law

In some classes of aspirational statement, States set down principles to guide their own behavior and provide standards by which that behavior could be judged. Dorothy Jones has identified this as a declaratory tradition in international law.¹⁶² According to Jones, States via their political leaders, foreign service officers, and delegates to international bodies, have become major contributors to the explication of international law. Jones notices that this tendency, first became evident after the First World War and has appeared with increasing frequency after the Second World War. In conferences, treaties, charters, declarations, covenants etc, States have set down principles to guide their own behaviour and to provide standards by which that behaviour could be judged.

In Jones' view, what States have produced from this process is a body of rules and reflections that is closer to moral philosophy than it is to positive law¹⁶³. She points out that this body of rules and reflections derived from various international instruments is characteristically couched in the language of philosophical statements. Jones illustrates this point by contrasting Article 1 of the 1947 peace treaty between the Allies and Italy, and Article 5h of the 1948 Charter of the Organisation of American States. Article 1 of the 1947 treaty states, "the frontiers of Italy shall, subject to the modifications set out in Articles 2, 3, 4, 11 and 22 be those which existed on 1 January, 1938." Article 5h of the

¹⁶² D.V. Jones, 'The Declaratory Tradition in Modern International Law', in T. Nardin and D.R. Mapel (ed.), *Traditions of International Ethics*, Cambridge, Cambridge University Press, 1992, pp. 42-61.

¹⁶³ *ibid* p.42.

1948 Charter states, "social justice and social security are bases of lasting peace."

Whilst Article 1 of the 1947 treaty deals with specific territorial arrangements necessary to establishing peace, article 5h of the 1948 treaty lays out general (philosophical) conditions necessary to establish peace.

Is the declaratory tradition of importance in considering international law? It would seem that if we want to learn about international norms, should we look at what States do and not at what they say? An answer is that, it is by declaratory law that States have spelled out what international law means to them and what they think it ought to be. In contrast to most domestic legal systems where the law maker is distinct from the subject of that law, in the international system, States are at the same time, law-maker and subject. What they say therefore with regard to what international law is can be taken seriously.

Is everything that States say in international instruments to be taken as law? The answer must be in the negative. States have, over the years been consistent in articulating fundamental principles that constitute State reflection upon proper action in the international sphere. It is only those statements of principle on which there is general consensus and which have been consistently affirmed that can be admitted as declaratory law.

The fundamental principles derived from State reflections and on which there is general consensus are: the sovereign equality of States; territorial integrity and political independence of States; equal rights and self-determination of peoples; non-intervention in the internal affairs of States; peaceful settlement of disputes between States; no threat or use of force; fulfilment in good faith of international obligations;

cooperation with other States; and respect for human rights and fundamental freedoms. These principles, in particular those relating to force, peaceful settlement and non-intervention can be seen in numerous resolutions, declarations, treaties and conventions. The principles can be seen in the Locarno arbitration agreements of 1925. The principles can also be seen in the Kellogg-Briand Pact of 1928 as well as in the Saavedra-Lamas Anti-War Treaty of 1933. The principles were restated in the UN Charter 1945.

Expanded treatment was given to the principles by a special UN committee that was formed in 1964 to bring the principles and rules under review. As a result of this review a declaration was adopted by the General Assembly in 1970 called the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁶⁴ The 1970 Declaration was adopted with the support of all voting blocks i.e. African, Asian, Latin American, socialist, and the developed States.

As Jones uses declaratory law, it is akin to a natural law concept. For example in looking to the future— that is looking to the law which is being sought to establish, the law as it ought to be, it is similar to *lex ferenda*. The declaratory tradition, according to Jones herself can also be analysed in Kantian terms i.e. following Kant's doctrine of states as moral persons subject to universal rights and duties. As Jones aptly puts it: [States] have "universalised the principles of their tradition, saying that the principles apply to all situations. From those principles the states have drawn a multitude of universal rules: 'every State has the duty...; States shall fulfill...; States shall take effective measures.'"¹⁶⁵

¹⁶⁴ UNGA Res 25/2625 (24 October 1970) UN Doc A/RES/25/2625.

¹⁶⁵ D.V. Jones, 'The Declaratory Tradition in Modern International Law', in T.Nardin and D.R. Mapel (ed.), *Traditions of International Ethics*, Cambridge, Cambridge University Press, 1992, p.56.

But declaratory law could also be understood in a number of ways closer to a positive law concept. For example it could be understood as Hart's primary law. The principles enunciated by declaratory law, in setting out what States must or must not do in their relations with one another is a form of primary law i.e. rules setting out obligations, laying out actions that must or must not be done or in other words rules setting out permissions and prohibitions. The idea of obligation imports the expectation that States are committing themselves to abiding by the rules they set. Indeed this is supported by the UN office of Legal Affairs' view in a memorandum to the Commission on Human Rights in which it was stated that declarations are: "solemn instruments... considered to import, on behalf of the organ adopting it, a strong expectation that members of the international community will abide by it"¹⁶⁶. There is also the idea that states make it, i.e. declaratory law has a contractual and not merely consensus, basis. Declaratory law also seems to establish principles that are justiciable.

3.5 Law as Process

Hard law, aspirational law and declaratory law are not created in isolation, but rather are the product of legal process i.e. a process of decision making.

By this conception international law encompasses the entire decision making process and is not restricted to rules.¹⁶⁷ Firstly, law as process includes the context within which rules are made and applied. The context as it relates to international law here, being the world social process and flowing from this, a world community. Secondly, policy

¹⁶⁶ Economic and Social Council, thirty-fourth session, suppl.No.8 (E/3616/Rev.1), paragraph 105.

¹⁶⁷ Higgins, R., *Problems and Process, International Law and How We Use It*, New York, Oxford University Press, 1996, pp.2-12.

considerations are an integral part of the decision making process. As Rosalyn Higgins has put it,

"Policy considerations, although they differ from rules are an integral part of that decision making process which we call international law; the assessment of so-called extralegal considerations is part of the legal process just as is reference to the accumulation of past decisions and current norms. A refusal to acknowledge political and social factors cannot keep law 'neutral', for even such a refusal is not without political and social consequence. There is no avoiding the essential relationship between law and politics."¹⁶⁸

Thirdly when decision makers, be they judges or legal advisors or any other decision maker makes a decision on the basis of international law, he or she is not simply 'finding the rule' and then applying it. Instead, what is taking place is the making of choices. The choice made is not between claims which are fully justified and claims which have no basis at all. Rather, the decision maker makes choices between claims which have varying degrees of legal merit.¹⁶⁹

Law as process conceives as law, decisions that are authoritative and controlling.¹⁷⁰ By authority is meant the normative expectations of relevant social actors i.e. expectations of community members about who is to make what decisions, in what structures, by

¹⁶⁸ *ibid* p. 5.

¹⁶⁹ Higgins, R., *Problems and Process, International Law and How We Use It*, New York, Oxford University Press, 1996, p. 3.

¹⁷⁰ L.Chen, *An Introduction To Contemporary International Law-A Policy-Oriented Perspective*, 2nd edn., New Haven, Yale University Press, 2000, pp.14-17.

what procedures and according to what goals and criteria.¹⁷¹ By control is meant effective participation in the choices that are put into community practice.¹⁷² Only those decisions that are made by authorised persons or organs, in appropriate forums and within the framework of established procedures, are 'legally' valid decisions. Put another way, the only decisions to be characterized as law, are those decisions that are made by persons or organs expected to make them, in accordance with criteria expected by the members of the community and by authorised procedures. This conception of law as a continuing process of authoritative decision making entails a variety of phenomena, including claims and counterclaims and decisions by a variety of authorised decision makers.

Authorised decision makers, termed participants are individuals or entities with at least minimum access to the process of authority in the sense of making claims or being subjected to claims.¹⁷³ These include States and international governmental organisations. But it also includes indigenous and other peoples as well as multinational corporations, the media, nongovernmental organisations and individuals. In international development law, the participants are primarily States and International governmental organisations i.e. the United Nations, its agencies, and the World Trade Organisation, but also some NGOs particularly those that have participated in conferences that have enunciated international development law norms.

The test of legal validity or whether a decision is in accordance with law in legal process, is the degree of the decision's conformity to relevant community expectations. In this regard the content of law and whether a particular decision is legally valid, is

¹⁷¹ *ibid* p. 16.

¹⁷² *ibid*.

determined by considering the conclusions and utterances made by the authorised decision makers.

There are various decision outcomes possible, each performing a particular legal function.¹⁷⁴ Outcomes are the various decisions taken when making and applying law to various problems.¹⁷⁵ Legal process conveniently classifies these decisions into functions i.e. intelligence (information); promotion; prescription; invocation; application; termination and appraisal. It is important to note that these functions are interrelated. Intelligence is the gathering, processing and dissemination of information essential to make decisions, for example, the United Nations Environment Programme (UNEP) collects and disseminates information about the world environment.¹⁷⁶

Promotion is the advocacy of policy alternatives.¹⁷⁷ Promotion includes taking initiatives to achieve enactment of prescriptions. Promotion also includes mobilizing people and resources to secure necessary commitments. A good example of promotion is a strategy now commonly employed by NGOs whereby they organise parallel forums as a complement to international conferences convened by the United Nations or other international governmental organisation. At the United Nations Conference on Environment and Development (Rio de Janeiro, 1992), NGOs convened a parallel forum called the Global Forum.

Prescription is the projecting of authoritative community policies about the shaping and

¹⁷³ *ibid* pp.25-76.

¹⁷⁴ *ibid* pp.325-373.

¹⁷⁵ J. Batt and D. C. Short, 'The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science, and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development', *Journal of Natural Resources & Environment Law*, vol.8, 1992-1993, p.323.

¹⁷⁶ L. Chen, *An Introduction To Contemporary International Law-A Policy-Oriented Perspective*, 2nd edn., New Haven, Yale University Press, 2000, p. 325.

¹⁷⁷ *ibid* pp. 333-339.

shaping and sharing of values.¹⁷⁸ The most deliberate form of prescription whereby governments cooperate with each other is the international agreement in its numerous forms and labels e.g. act, agreement, charter, convention, covenant, declaration, treaty.¹⁷⁹

Invocation is the provisional characterization of events in terms of community prescriptions.¹⁸⁰ Invocation involves people making allegations about what has happened, what policies have been violated, and what future action might remedy the wrong.¹⁸¹ Invocation is not a very prominent function in development law.

Application is the relatively final characterisation of events by decision makers in terms of community prescription and the management of sanctioning measures to secure enforcement.¹⁸² In more conventional terms application includes reporting, negotiation, good offices, mediation, conciliation, arbitration and adjudication.¹⁸³

Appraisal is evaluating performance in decision process in terms of community goals.¹⁸⁴ Appraisal can be carried out through international conferences dedicated to a particular subject, for example, the Conference on Population and Development and the United Nations Conference on Environment and Development involved the exchange of information and knowledge, the making of new proposals and mobilizing support for action, all with the key objective of appraisal.¹⁸⁵ Lastly, there is termination which is the ending of a prescription.

¹⁷⁸ *Ibid* p.341.

¹⁷⁹ *Ibid* pp. 255,256,342.

¹⁸⁰ *Ibid* p. 352.

¹⁸¹ *Ibid*.

¹⁸² *Ibid* p. 357.

¹⁸³ *Ibid*.

¹⁸⁴ *Ibid* p. 373.

¹⁸⁵ *Ibid* p 376.

3.6 Conclusion

This thesis takes the view that the basis of contemporary international law is consensus. The view of consensus here is that of a spectrum of agreement that broadly runs from a bare majority to unanimous agreement. Consensus must also include the agreement of all groups. This means international development law must reflect a consensus between developing and developed countries. The classic list of sources of international law enumerated in Article 38 of the Statute of the International Court of Justice is a helpful starting point in considering the sources of international development law. Particularly significant, are treaties enshrining international development law. However, taking consensus as the basis of international law entails that resolutions and declarations of international organisations, as well as conference outcome documents are also important sources of international development law.

The identifying characteristics or criteria of 'true law' to be applied to international development law, may be summarised as follows:

Following positivism, law consists of rules. Hart provides a useful criterion for the identification of rules of international development law. According to Hart, there are primary rules of obligation and secondary rules. Primary rules of obligation set out what must or must not be done. Secondary rules are related to the primary rules themselves. The secondary rules specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined. Hart called these secondary rules, the rule of recognition, the rule of change and the rule of adjudication. A rule of recognition is a rule for conclusive identification of primary rules of obligation. A rule of change empowers individuals or a

body of persons to introduce new primary rules. A rule of adjudication empowers individuals to make authoritative determinations of the question whether on a particular occasion, a primary rule has been broken. In addition to identifying the individuals who are to adjudicate, the rule of adjudication also defines the procedure to be followed. These criteria of primary rules and secondary rules will be applied to the body of international development law and particularly to the special and differential treatment provisions of the WTO agreements. The result should be a clearer understanding of which of these provisions stand as legal rules of international development law.

Following the natural law tradition or aspirational law, international development law, as true law, consists of goals that reflect a norm that is sincerely desired by government with subsequent legal processes showing a movement towards the goal. I add to this that the movement is towards hard law. A useful guide to gauging a movement towards hard law is to map the criteria of aspirational law along the characteristics of obligation, precision and delegation. I will return to these criteria in the aspirational law chapter. Aspirational law is linked to declaratory law which enunciates principles. The main criterion of declaratory law is that States themselves articulate the principles to guide their behavior. These principles are affirmed and reaffirmed and are evident in the numerous declarations on development. I will return to these declarations in the Declaratory Law chapter.

Following the legal process understanding, international development law as true law, consists of a wide variety of legal phenomena. There are numerous participants including States, intergovernmental organisations and nongovernmental organisations. There are also numerous decision outcomes performing particular functions. Applied to international development law this entails a number of legal phenomena including norms, principles and rules.

The analytical chapters that follow will now apply these criteria to international development law.

CHAPTER 4

ASPIRATIONAL LAW

4.1 Introduction

The aim of this chapter is to illustrate international development law as aspirational law. Further, this illustration points to development assistance as a norm of international development law.

The locus of aspiration to development are many. I begin with the Food Aid Conventions. Next I consider the WTO agreements, in particular, provisions of the General Agreement on Tariffs and Trade (GATT 1994), the WTO Agriculture Agreement, the WTO Agreement on Application of Sanitary and Phytosanitary Measures, the WTO Agreement on Technical Barriers to Trade, the WTO Agreement on Implementation of Article VII of the GATT 1994, the WTO General Agreement on Trade in Services (GATS), the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Following this, I consider the United Nations Framework Convention on Climate Change (UNFCCC 1994) and the Vienna Convention on the Protection of the Ozone Layer (1985).

I begin with the criteria that will be employed in this analysis.

4.2 Criteria

Aspirational law in its ideal form represents, or expresses, a genuine popular aspiration, nationally or internationally, the expressed goal being one that is sincerely desired by government or a section of government, with subsequent legal processes

demonstrating a movement towards the goal.’¹⁸⁶ To this, I would add that the subsequent legal processes must show a movement to hard law. As observed in the previous chapter, a good guide to illustrating a movement to hard law is by utilising Abbott et al. characterisation of legalization¹⁸⁷ i.e. along the characteristics of obligation, precision and delegation.

Aspirational law obligations are between the two extremes of ‘hard legal obligations’ and ‘commitments that are non-binding’. One example of aspirational law is the contingent obligation: an example of this type of obligation is the 1994 Framework Convention on Climate Change that requires parties to take actions to limit greenhouse gas emissions but only contingent on “their specific national and regional development priorities, objectives, and circumstances.”¹⁸⁸ Another example is the escape clause in legal obligations. By using escape clauses, states are able to escape from strict legal obligations by filing reservations, unilateral conditions and declarations. Another example are hortatory commitments that create only weak legal obligations. Hortatory commitments usually require parties, only to fulfil obligations on a “best endeavour” basis, to “seek to promote” or to fulfil obligations with due regard “to their circumstances.” For example the International Covenant on Economic, Social and Cultural Rights states that parties are to take steps: “...with a view to achieving progressively the full realisation of the rights recognised in the... Covenant.”¹⁸⁹

¹⁸⁶ Professor Yasauki Onuma as recounted to Professor Cornelia Navari. Meeting, London 30 October 2010.

¹⁸⁷ K.W. Abbott et al., ‘The Concept of Legalization’, *International Organization*

Vol. 54, No. 3, Legalization and World Politics, Summer, 2000, p. 401-419.

¹⁸⁸ United Nations Framework Convention on Climate Change (adopted 09 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 4.

¹⁸⁹ International Covenant on Economic, Social and Cultural Rights UN Doc. A/6316 (1966) art 2.

Aspirational law delegation is characteristically low or moderate. Delegation is the extent to which States and other actors delegate authority to third parties. Third parties include arbitrators and administrative organisations. Legal delegation takes the characteristic form of third-party dispute settlement mechanisms that interpret and apply legal rules to particular facts.

Aspirational law delegation tends to be through institutionalised forms of bargaining, and will generally include mechanisms to facilitate agreement, for example mediation (for example, mediation is available within the WTO); conciliation; nonbinding arbitration (this system was available under old GATT); and binding arbitration. In addition to dispute resolution, there are also institutions whose role is implementation of agreed rules, elaboration of imprecise legal norms and facilitating enforcement.

International organisations (states being the other parties with delegated authority) often have the delegated authority to elaborate agreed norms. The elaboration of norms takes the form of regulations, recommendations and draft international conventions. Additionally, operational activities implement legal norms, for example, the WTO engages in training programs for developing country officials.¹⁹⁰

Precision is that characteristic of law that specifies what is expected of actors in terms of the intended objective and the means of achieving it. The specification can be in terms of 'rules' or 'standards'. In the case of rule-like normative prescriptions, categories of behavior deemed as unacceptable are decided *ex ante*, typically by legislative bodies. With regard to standards on the other hand, the determination of unacceptable behaviour is made *ex post* the determination typically being made by courts. Standards allow for the taking into account of equitable factors, for example

¹⁹⁰ K.W. Abbott et al., 'The Concept of Legalization', *International Organization* Vol. 54, No. 3, Legalization and World Politics, Summer, 2000, p. 417.

"due care".

International law is generally quite precise, the aim being to increase determinacy and narrow interpretation issues. For example, precision is achieved by 'codification' and 'progressive development' of customary international law. Of course not all international law is precise and there are many treaty commitments that are vague and general. Vague treaty commitments include those requiring actors to: "pursue negotiations in good faith", "create favourable conditions", "avoid unreasonable regulations", and the many agreements calling on states to "negotiate" or "consult" without laying out particular procedures, leaving broad areas of discretion for the actors.

It is important to note that aspirational law is to be distinguished from *lex ferenda*.

Unlike *lex ferenda*, aspirational law is closer to 'hard law'. Aspirational law fulfils all three criteria of obligation, precision and delegation. *Lex ferenda* on the other hand would not normally have delegation. There is usually no way to implement *lex ferenda*.

In summary, the criteria for aspirational law are as follows: the obligation may be contingent, contain an escape clause or be hortatory. Delegation is usually moderate to low. The delegation here is mainly administrative or operational in nature as opposed to strong delegation which is usually in the form of judicial or quasi-judicial authority. Delegation can take the form of mediation, conciliation or arbitration. Precision is generally precise, but can also include vague commitments.

4.3 Food Aid Convention

One of the first aspirational law documents with regard to developing countries are the

series of Food Aid Conventions.¹⁹¹ The Food Aid Convention 1980 stipulated a relatively hard obligation: Article 1 of the Convention sets out the main objective of the Convention as securing , through a joint effort by the international community, the achievement in physical terms of the World Food Conference target of at least 10 million tons of food aid annually to developing countries (in the form of wheat and other grains suitable for human consumption). Under the Food Aid Convention, developed countries agreed to contribute, as food aid, to the developing countries grains in the minimum annual amounts specified for each relevant form of grain (maize, wheat, barley, oats etc.). The Food Aid Convention is also quite precise in the forms in which the obligations are to be fulfilled: by gifts of grain or gifts of cash to be used to purchase grain for recipient countries; sales for the currency of the recipient country which is not transferable and is not convertible into currency or goods and services for use by the donor members; sales on credit, with payment to be made in reasonable amounts over periods of 20 years or more and with interest at rates which are below commercial rates prevailing in world markets. The obligation, however, is a contingent one, as the aid is to be supplied to the "maximum extent possible" by way of gifts, particularly in the case of the least developed countries, low per capita income countries and other developing countries in serious economic difficulties.

The Food Aid Conventions including the later 1999 Food Aid Convention have been replaced by the Food Assistance Convention 2013.¹⁹² The Food Assistance Convention 2013 confirms the continued commitment of the parties to the "still valid" objectives of the Food Aid Convention 1999. These objectives are: contributing to world food security; improving the ability of the international community to respond to food

¹⁹¹ The first being in 1967: <http://www.foodaidconvention.org/en/index/aboutthefac.aspx> (accessed 7 September 2014).

¹⁹² Food Assistance Convention (adopted 25 April 2012, came into force 1 January 2013) available at <https://treaties.un.org/Home.aspx?lang=en> (accessed 7 September 2014).

situations and pertinently, other "food needs of developing countries."¹⁹³

Under the Food Assistance Convention (2013), parties to the Convention, mainly being developed countries, have an obligation to meet a "minimum annual commitment" of food assistance. The minimum annual commitment is quite precise and is further elaborated in the 'Rules of Procedure and Implementation'.¹⁹⁴ The minimum annual commitment is to be expressed by the contributing parties, in terms of value or quantity. Further a party may choose to express the annual commitment as either a minimum value or a minimum quantity, or a combination of both. Minimum annual commitments in terms of value can be expressed in the currency chosen by the party. Minimum annual commitments in terms of quantity can be expressed in tonnes of grain equivalent or other units of measure provided under the Rules of Procedure and Implementation. Contributions made to meet minimum annual commitments should be made in fully grant form whenever possible. With respect to food assistance counted towards a Party's commitment, not less than 80 per cent provided to Eligible Countries and Eligible Vulnerable Populations, as further elaborated in the Rules of Procedure and Implementation, shall be in fully grant form. To the extent possible, the Parties shall seek progressively to exceed this percentage. The Parties shall ensure that the provision of food assistance is not tied directly or indirectly, formally or informally, explicitly or implicitly, to commercial exports of agricultural products or other goods and services to recipient countries. Contributions provided to meet the minimum annual

¹⁹³ Food Assistance Convention (adopted 25 April 2012, came into force 1 January 2013) , preamble, paragraph 1.

¹⁹⁴ *ibid* art 7(3), which states: "The Committee shall adopt rules governing its proceedings: it may also adopt rules elaborating further the provisions of this Convention to ensure that they are properly implemented. Document FAC(11/12)1 – 25 April 2012 of the Food Aid Committee of the *Food Aid Convention, 1999* shall serve as the initial Rules of Procedure and Implementation for this Convention. The Committee may subsequently decide to modify those Rules of Procedure and Implementation."

commitment under this Convention may only be directed at Eligible Countries or Eligible Vulnerable Populations (set forth in Article 4 and as further elaborated in the Rules of Procedure and Implementation.) The Parties' contributions may be provided bilaterally, through intergovernmental or other international organisations, or through other food assistance partners, but not through other Parties.

Delegation under the Food Assistance Convention is weak. There does not appear to be a judicial process established under the Convention to settle disputes. Instead a Food Assistance Committee (the "Committee")(Article 7) has been established to resolve any dispute among the parties concerning the interpretation or implementation of the Convention (Article 11). The Committee is also to resolve any claim of failure to perform the obligations set out in the Convention. The Committee adopts rules governing its proceedings and further may adopt rules elaborating further the provisions of the Convention to ensure its implementation. The Committee may also modify the rules of procedure and implementation.

Delegation is also vested in a Secretariat established under the Convention. Each party to the Convention is to notify the Secretariat of its initial minimum annual commitment as soon as possible and no later than six months following the entry into force of the Convention, or within three months of its accession to the Convention. Article 6 of the Convention provides that:

Within ninety days after the end of the calendar year, each party, shall provide an annual report to the Secretariat detailing how it met its minimum annual commitment under the Convention. This annual report shall contain a narrative component that may include information on how the party's food assistance policies, programs and operation contribute to the objectives and principles of the Convention. These two mandatory

reporting provisions are followed by a non-mandatory provision imploring the parties that they should, on an ongoing basis, exchange information on their food assistance policies and programs and the results of their evaluations of these policies.

Further, each party is to notify the Secretariat of any change to its minimum annual commitment for subsequent years (no later than the fifteenth day of December of the year preceding the change). Each party is to make every effort to meet its minimum annual commitment. In the event that a party is unable to meet its minimum annual commitment for a particular year, it must describe the circumstances of its failure to do so in its annual report to the Secretariat. In this event, the Secretariat is to add the unfulfilled amount to the party's minimum annual commitment for the following year, unless the Committee decides otherwise, or unless extraordinary circumstances justify not doing so.

4.4 WTO Agreements

Giving trade preferences and special and differential treatment for developing countries is well established in the WTO:

Article 37 of the GATT 1994, stipulates an obligation on developed countries to reduce and eliminate barriers to products currently or potentially of particular export interest to less-developed contracting parties (article 37.1(a)).¹⁹⁵ The barriers to be reduced or eliminated include customs duties and other restrictions which differentiate between products in their primary and in their processed forms. The obligation however is

¹⁹⁵ General Agreement on Tariffs and Trade 1994 (15 April 1994) art 37.1(a) LT/UR/A-1A/1/GATT/1, <http://docsonline.wto.org> (accessed 25 August 2014).

qualified by requiring developed countries to fulfil this obligation to the "fullest extent possible". This means that developed countries are to fulfil their obligation except in cases when "compelling reasons", which may include legal reasons, make it impossible to give effect to this obligation. Developed countries are thus provided with an escape clause by allowing for circumstances when they are not required to fulfil the stipulated obligation.

The WTO Agreement provides for a hard form of delegation, in the form of the dispute settlement mechanism.

However, the provisions discussed here are no more than aspirations because they are such that delegation with regard to them is weak. These provisions cannot be the basis of a claim before a panel or the appellate body of the WTO. Delegation in terms of interpretation and implementation is mainly through Committees established under the particular Agreements.

For example, delegation under Article 37.2 of the GATT 1994, is by consultation between the CONTRACTING PARTIES.¹⁹⁸ In instances where the obligations under Article 37 are not being given effect, this is to be reported to the CONTRACTING PARTIES, by the contracting party not giving effect or by any other interested contracting party. The GATT does not compel specific performance of the obligation nor are there stipulated reparations for derogation. Rather, what is envisaged is arriving at a solution agreeable to all concerned or any interested parties. Further it is seen under this article that joint action may be the way to more readily achieve the

¹⁹⁸ General Agreement on Tariffs and Trade 1994 (15 April 1994) art 37.2 LT/UR/A-1A/1/GATT/1, <http://docsonline.wto.org> (accessed 25 August 2014).

obligations under this article. In this regard, para 2(c)(ii) states: "As the implementation of the provisions...by individual contracting parties may in some cases be more readily achieved where action is taken jointly with other developed contracting parties, such consultation might, where appropriate, be directed towards this end"¹⁹⁷

Under Article 16 of the WTO Agriculture Agreement, developed country members have an obligation to take such action as is provided for in the "Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing countries. (article 16.1)".¹⁹⁸

Delegation under Article 16 of the WTO Agriculture Agreement is via the Committee on Agriculture. The Committee on Agriculture monitors the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing countries.¹⁹⁹

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures provides for an obligation on developed country members to take account of the special needs of developing country and least-developed country members, in the preparation and application of sanitary or phytosanitary measures (Article 10).²⁰⁰ This obligation is also to be classed as aspirational, as it is not clear firstly what the "special needs of the developing countries" are in the circumstances and how precisely these are to be taken into account. Indeed, several Members have noted that it is difficult for a Member

¹⁹⁷ *ibid* art 37.2(c)(ii) L/T/UR/A-1A/1/GATT/1. <http://docsonline.wto.org> (accessed 25 August 2014).

¹⁹⁸ Agreement on Agriculture (15 April 1994) art 16.1 L/T/UR/A-1A/2 <http://docsonline.wto.org> (accessed 25 August 2014).

¹⁹⁹ *ibid* art 16 L/T/UR/A-1A/2 <http://docsonline.wto.org> (accessed 25 August 2014).

²⁰⁰ Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) art 10

considering the application of a food safety, plant or animal health protective measure to identify the special needs of developing countries and to take these into account.²⁰¹

The WTO Agreement on Technical Barriers to Trade provides for an obligation on WTO members to provide differential and more favourable treatment to developing country members (Article 12.1).²⁰² Members have an obligation to take into account the special development, financial and trade needs of developing country members in the implementation of the Agreement on Technical Barriers to Trade, both at their respective national levels and in the operation of the Agreement's institutional arrangements (Article 12.2). In the preparation and application of technical regulation, standards and conformity assessment procedures, WTO members have an obligation to take account of the special development, financial and trade needs of developing country members (Article 12.3). The aim of Article 12.3 is to ensure that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country members. Further, Article 12.5 of the Agreement on Technical Barriers to Trade shall take 'reasonable measures' as may be available to them, to ensure that international standardizing bodies and international systems for conformity assessment are organised and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members. In addition Article 12.6 of the Agreement on Technical Barriers to Trade provides that: members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country members,

LT/UR/A-1A/12.<http://docsonline.wto.org> (accessed 8 September 2014).

²⁰¹ World Trade Organisation Secretariat, Special and Differential Treatment Provisions in WTO Agreements and Decisions, 8 June 2010, TN/CTD/W/33.

²⁰² Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10.

examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country members. As can be seen, WTO members have an obligation under Article 12.6 to ensure that international standardizing bodies prepare international standards concerning products of special interest to developing country members. However, the obligation is weakened by the qualifying: 'reasonable measure', 'examine the possibility of' and 'if practicable'.

Delegation under Article 12 of the Agreement on Technical Barriers to Trade is in the form of monitoring.²⁰³ Article 12.10 of the Agreement on Technical Barriers to Trade provides that the Committee established under this agreement shall examine periodically the special and differential treatment provisions laid out in the Agreement as granted to developing country members on national and international levels.

Under the Agreement on Implementation of Article VII of the GATT 1994 developed country members, have an obligation to provide technical assistance to developing country members.²⁰⁴ Article 20.3 of the Agreement on Implementation of Article VII of the GATT 1994 states that "developed country members shall furnish, on mutually agreed terms, technical assistance to developing country members that so request". Article 20.3 is quite precise in detailing how this obligation is to be fulfilled. Article 20.3 stipulates that developed country members are to draw up programmes of technical assistance which may include, inter alia, training of personnel, assistance in preparing implementation measures, access to sources of information regarding customs valuation methodology, and advice on the application of the provisions of this

²⁰³ Ibid art 12. LT/UR/A-1A/10.

²⁰⁴ Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (15 April 1994) LT/UR/A-1A/4.

Agreement.

Delegation in implementing all requests for technical assistance are dealt with through the process established under the Institute for Training and Technical Cooperation (ITTC).

Developed country members of the WTO have an obligation to facilitate access of developing country Members' service suppliers to information, related to their respective markets (Article IV:2 GATS).²⁰⁵ Article IV:2 GATS, states that: "developed country members...shall establish contact points....to facilitate the access of developing country Members' service suppliers to information, related to their respective markets. Article IV:2 is precise in stipulating the timeframe within which this obligation must be met i.e. two years from the date of entry into force of the WTO Agreement. Further, Article IV:2 is precise in the type of information to be made accessible to developing country members i.e. commercial and technical aspects of the supply of services; registration, recognition and obtaining of professional qualifications; and the availability of services technology.

Under the WTO Agreement on Trade related aspects of Intellectual Property Rights (TRIPS), developed country members have an obligation to provide technical and financial assistance to developing and least-developed country members.²⁰⁶ Article 67 of the Agreement on Trade related aspects of Intellectual Property Rights (TRIPS), states: "In order to facilitate the implementation of this Agreement, developed country members shall provide, on request and on mutually agreed terms and conditions.

²⁰⁵ General Agreement on Trade in Services (15 April 1994), art. IV:2, LT/UR/A-1B/S/1.

²⁰⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (15 April 1994) LT/UR/A-1C/IP/1.

technical and financial cooperation in favour of developing and least-developed country members. The obligation is not very precise as it is left up to the developed and developing countries to agree on the terms and conditions on which the technical and financial assistance is to be provided. However, the provision does stipulate the type of assistance to be provided i.e. assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse. The assistance to developing countries also includes support regarding the establishment or reinforcement of domestic offices and agencies, including the training of personnel.

Delegation under Article 67 of TRIPS is mainly in the form of monitoring compliance and sharing information.²⁰⁷ The TRIPS Council monitors compliance with the obligation contained in Article 67. Considerable attention has been given by the TRIPS Council to the provision of technical cooperation on the basis of Article 67 of the TRIPS Agreement, this issue being a regular item on the agenda of the Council's meetings. The TRIPS Council further facilitates the sharing of information on technical cooperation possibilities available and provides an opportunity to identify any needs not adequately being addressed. In fact, developed countries have provided, on an annual basis, for a special technical cooperation review meeting normally held at the end of year TRIPS Council's meeting, reports on their technical and financial cooperation activities of relevance. Developed countries have also notified contact points in their administrations for technical cooperation.

A similar provision to Article 67 of TRIPS is Article 66 of the same agreement. Article 66

²⁰⁷ Ibid art 67, LT/UR/A-1C/IP/1.

of TRIPS provides that developed country members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country members.²⁰⁸ The objective of the obligation stipulated in Article 66 is to enable developing country members to create a sound and viable technological base. Paragraph 7 of the Doha Declaration on the TRIPS Agreement and Public Health reaffirmed the obligation of developed country members on the basis of Article 66.2.²⁰⁹ Further, according to the Decision of the General Council on the Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health²¹⁰ and the Protocol Amending the TRIPS Agreement²¹¹, Members also undertook to cooperate in paying special attention to the transfer of technology and capacity building in the pharmaceutical sector on the basis of Article 66.2.

Delegation under Article 66 of TRIPS is through a monitoring mechanism. Following the instructions of the Ministerial Conference to the TRIPS Council in paragraph 11.2 of the Decision on Implementation-Related Issues and Concerns,²¹² a Decision of the TRIPS Council of 20 February 2003 established a mechanism monitoring the implementation of the obligations under Article 66.2.²¹³ Under this monitoring mechanism, developed country members are required to submit reports annually on actions taken or planned in pursuance of their obligations under Article 66.2. Further, under the monitoring mechanism, developed countries are to provide new detailed reports every third year

²⁰⁸ Ibid art 66, LT/UR/A-1C/IP/1.

²⁰⁹ WT/MIN(01)/DEC/2.

²¹⁰ WT/L/540 and Corr.1

²¹¹ WT/L/641.

²¹² WT/MIN (01)/17.

²¹³ Decision of the Council for TRIPS, Implementation of Article 66.2 of the TRIPS Agreement (19 February 2003) IP/C/28, http://www.wto.org/english/tratop_e/trips_e/techtransfer_e.htm (accessed 13 August 2014).

and updates in the intervals. These reports are reviewed regularly at the TRIPS Council's end of year meetings.

The dispute settlement understanding (DSU) provides several provisions stipulating obligations to give attention to the particular problems and interests of developing country members.²¹⁴ During consultations, Members, should give special attention to developing country Members' particular problems and interests (Article 4.10 DSU). Particular attention should also be paid to matters affecting the interests of developing country members with respect to measures which have been the subject of dispute settlement (Article 21.2 DSU). In a case brought by a developing country Member, the Dispute Settlement Body, in considering what appropriate action might be taken is required to take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members (Article 21.8 DSU).

4.5 United Nations Framework Convention on Climate Change

Under Article 4 of the United Nations Framework Convention for Climate Change (UNFCCC), developed country parties have an obligation to provide financial resources to developing countries.²¹⁵ These are specified as new and additional financial resources to meet the agreed full costs incurred by developing country parties in complying with their obligations (under Article 12, paragraph 1). Further, developed country parties have an obligation to meet the full incremental costs incurred by

²¹⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) L.T/UR/A-2/DS/U/1.

²¹⁵ United Nations Framework Convention on Climate Change (adopted 09 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

developing countries (under Article 4, paragraph 1) as long as the costs are agreed between the developing country party and the international entity or entities (referred to in Article 11, according to that Article). In fulfilling these obligations developed countries are required to take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country parties. As can be seen the obligation is not very precise.

Delegation under the UNFCCC is in the form of review of implementation, by the 'Conference of Parties'. Article 7.1 of the UNFCCC establishes the Conference of Parties via the statement: a 'Conference of the Parties is hereby established.' The Conference of the Parties is the supreme body of the Convention and is charged with keeping under regular review the implementation of the Convention. The Conference of Parties reviews any related legal instruments that it may adopt and makes decisions within its mandate, necessary to promote effective implementation of the Convention. The Convention further elaborates on how the Conference of Parties is to achieve effective implementation of the Convention (firstly, by periodically examining the obligations of the Parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge; secondly, promoting and facilitating the exchange of information on measures adopted by the Parties to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective obligations under the Convention; thirdly, facilitating at the request of two or more Parties, the coordination of measures adopted by them to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and

their respective obligations under the Convention). The Conference of Parties considers and adopts regular reports on the implementation of the Convention and ensure their publication.

The Conference of Parties can also establish such subsidiary bodies as it deems necessary for the implementation of the Convention. One such subsidiary body is the Subsidiary Body for Scientific and Technological advice. The Subsidiary Body for Scientific and Technological advice provides advice on scientific programmes, international cooperation in research and development related to climate change, as well as on ways and means of supporting endogenous capacity-building in developing countries. The Conference of Parties adopts its own rules of procedure as well as those of the subsidiary bodies established by the Convention, including decision-making procedures for matters not already covered by decision-making procedures stipulated in the Convention. These procedures may include specified majorities required for the adoption of particular decisions.

The provision of financial resources is implemented through the Conference of Parties (Article 11). Article 11 defines the provision of financial resources on a grant or concessional basis, including for the transfer of technology. The functioning of the financial mechanism is under the guidance and accountability of the Conference of Parties, which decides on its policies, programme priorities and eligibility criteria. The operation of the financial mechanism is entrusted to one or more existing international entities. The developed country Parties may also provide developing country Parties with financial resources through bilateral, regional and other multilateral channels.

In their reporting, developed country parties are required to incorporate information on

how they have implemented Article 4. Article 12 dealing with communication of information and related implementation states that each developed country party shall incorporate details of measures taken in accordance with Article 4 (paragraphs 3, 4 and 5).

The Conference of Parties also has delegated responsibility to resolve questions regarding implementation and settlement of disputes through consultation or negotiation. According to Article 13, the Conference of the Parties could, at its first session, consider the establishment of a multilateral consultative process, available to the Parties on their request, for the resolution of questions regarding the implementation of the Convention. In the event of a dispute between the parties concerning the interpretation or application of the Convention, the Parties concerned shall seek to settle their dispute through negotiation or any other peaceful means of their own choice (Article 14).

The Kyoto Protocol reaffirms the obligations under Article 4 of the UNFCCC (Article 10).²¹⁶

The Kyoto Protocol elaborates on how the obligations under Article 4 of the UNFCCC are to be implemented (Article 10).²¹⁷ Parties are to cooperate in the promotion of effective modalities for the development, application and diffusion of, and take all practicable steps to promote, facilitate and finance, the transfer of or access to, environmentally sound technologies, knowledge, practices and processes pertinent to

²¹⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol) (adopted 11 December 1997, came into force 16 February 2005) 37 ILM 22 (1998).

²¹⁷ Ibid art 10, 37 ILM 22 (1998).

climate change to developing countries. This is to include the formulation of policies and programmes for the effective transfer of environmentally sound technologies that are publicly owned or in the public domain. Parties are also to create an enabling environment for the private sector, to promote and enhance the transfer of and access to environmentally sound technologies.

According to the Kyoto Protocol, the obligation to transfer technical know-how to developing countries is also to be achieved by education and training programmes. According to Article 10 of the Protocol, parties are to cooperate at the international level and where appropriate using existing bodies to develop and implement education and training programmes. The aim of the education and training programmes is to strengthen national capacity building, in particular human and institutional capacities. The education and training programmes are to include the exchange or secondment of personnel to train experts in the field covered by the UNFCCC. The Kyoto Protocol requires that suitable modalities should be developed to implement these activities through the relevant bodies of the Convention (taking into account Article 6 of the Convention).

4.5 Vienna Convention on the Protection of the Ozone Layer

Article 4 of the Vienna Convention on the Protection of the Ozone Layer (1985) stipulates a contingent obligation.²¹⁸ Being a treaty, the obligations contained in the Vienna Convention on the Protection of the Ozone Layer, are *prima facie*, legally binding. Article 4, however, is a contingent obligation. Article 4 requires parties to

²¹⁸ Convention for the Protection of the Ozone Layer (adopted 22 March 1985, came into force 22 September 1988), 1513 UNTS 323, art 4.

cooperate to and transfer technology and knowledge, either directly or via competent international bodies, with particular regard given to developing countries. This obligation to cooperate in the development and transfer of technology and knowledge, is contingent on the parties' "national laws, regulations and practices."

The language of the obligation stipulated in Article 4, is also, in part, hortatory. The Article begins with "The Parties *shall* cooperate" and further states that the "...cooperation *shall* be carried out..." However, this mandatory language is watered down by requiring parties only to *promote* the development and transfer of technology and knowledge.

Article 4 of the Vienna Convention on the Protection of the Ozone Layer (1985) is also quite precise in spelling out how this obligation is to be achieved. The obligation to cooperate to transfer technology and knowledge is to be achieved by, *inter alia*, the facilitation of the acquisition of alternative technologies by other Parties; provision of information on alternative technologies and equipment; supply of manual and guides; supply of equipment and facilities for research and systematic observations and training of scientific and technical personnel. With regard to appropriate scientific and technical training, Annex 1 of Vienna Convention on the Protection of the Ozone Layer (1985) puts particular emphasis on intercalibration of observational instrumentation and methods with a view to generating comparable or standardized scientific data sets.²¹⁹

Settlement of disputes under the Vienna Convention on the Protection of the Ozone Layer (1985) is by negotiation; arbitration; mediation; or conciliation. When a dispute

²¹⁹ Ibid annex 1, 1513 UNTS 323.

arises between the parties concerning the interpretation or application of the Convention, including those provisions providing for obligations to be performed by developed country parties vis-à-vis developing country parties, the dispute is to be resolved by negotiation (Article 11.1). If the parties in dispute cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by a third party (Article 11.2). Parties can also avail themselves of arbitration as a means of settling disputes (Article 11.3(a)) in accordance with the procedures adopted by the Conference of the Parties. If the parties to a dispute have not accepted the settlement of disputes by negotiation, mediation nor arbitration, the dispute is to be resolved by conciliation (Article 11.4). According to Article 11.5 a conciliation commission is to be created upon the request of one of the parties to the dispute. The conciliation commission renders a final recommendatory award which the parties are to consider in good faith.

A Conference of the parties (Article 6) keeps under continuous review the implementation of the Vienna Convention on the Protection of the Ozone Layer. With regard to developing countries, the Conference of parties shall adopt programmes for research, systematic observations, scientific and technological cooperation, the exchange of information and the transfer of technology and knowledge.

4.7 Conclusion

The foregoing illustrate the aspects of international development law as aspirational law. The examples considered are all treaty provisions satisfying Onuma's criteria of being sincerely desired by government with subsequent legal processes demonstrating

a movement towards the goal. Treaties are of course a traditional source of international law and often an example of the hardest of law. Framing these provisions in law, treaty law, in this way, cannot but be taken as a reflection of governments' sincerity in desiring, and over time, conforming to the goals set. What makes these provisions aspirational is that the obligation is weak (i.e. hortatory, contingent or qualified by an escape clause). Crucially, delegation is also low to moderate, for example it is by mediation, conciliation or via committees, rather than via third-party judicial bodies.

Discussions are currently ongoing within the WTO to strengthen special and differential treatment provisions and make them more effective and operational. The Doha Declaration mandates the Committee on Trade and Development to identify which of those special and differential treatment provisions are mandatory and to consider the legal and practical implications of making mandatory those which are currently nonbinding. Further, a monitoring mechanism for all special and differential treatment provisions, which was originally suggested by the African group in 2002, was adopted by a ministerial decision in December 2013.³²⁰ All this points to evidence of an aspiration to 'hard law'.

Two central pillars of an aspirational development law can be identified. One is the giving of development assistance to developing countries by developed countries. Development assistance can take numerous forms including technical assistance, financial assistance, technology transfer and food assistance. The second pillar, and connected to the first pillar is the recognition that developing countries have special needs which developed countries must take account of. Development assistance cuts across all the areas of development law that have been considered here and it may be

argued that this is a norm of international development law.

Dorothy Jones has identified a strong tendency of this type of 'aspirational' law-making, particularly since 1945 and has called this a 'declaratory tradition' in contemporary international law. It is to this law, declaratory law, that I now turn in the next chapter.

²²² Ministerial Decision of 7 December 2013, WT/MIN/(13)/45, WT/L/920.

CHAPTER 5

DECLARATORY LAW

5.1 Introduction

The aim of this chapter is to illustrate international development law as declaratory law. Further, as declaratory law enunciates principles declared by States, this will also reveal the key principles of international development law.

I will begin by outlining the criteria or elements that I will then apply to international development law instruments. I will focus on key UN declarations and conference outcome documents as examples: Stockholm declaration (1972), the World Charter for Nature (1982), the declaration on the Right to Development (1986), Rio Declaration (1992), the Millennium declaration (2000), Johannesburg declaration (2002), declarations establishing the United Nations 'development decades', as well as declarations with important implications found in the Charter of the United Nations and the Universal Declaration of Human Rights.

5.1(a) Elements in the identification of a declaratory law

The first element of declaratory law is that it is made by states. States have articulated declaratory law through their political leaders, foreign service officers and delegates to international bodies.²²¹ What they have articulated can be seen in conference outcome documents, in declarations, in charters and similar documents.

²²¹ D.V. Jones, 'The Declaratory Tradition in Modern International Law', in T. Nardin and D.R. Mapel (ed.), *Traditions of International Ethics*, Cambridge: Cambridge University Press, 1992.

The second element of declaratory law is that it enunciates goals, constitutive principles and frequently, statements of public values. Goals are future oriented and articulate the common good e.g. "primary education shall be compulsory and available free to all." Constitutive principles are the methods by which the goals are to be achieved. Public values are commonly shared beliefs and act as reference points for judgements of international tribunals.

The third element and following positive law criteria, there are prohibitions and permissions. Prohibitions and permissions set out the obligations. These are statements of the actions to be done or to refrain from doing.

5.2 Public Values

The Charter of the United Nations 1945²²² and the Universal Declaration of Human Rights 1948²²³ provide the core values of development. The United Nations Charter specifies the value that the pursuit of development goals is to have universal application. The Charter recognises the need for development action on a global scale. Improving standards of living is to be for people everywhere and the promotion of full employment and conditions of economic and social progress is for all parts of the world. Further development goals are to be pursued with full regard to human rights and fundamental freedoms. All this is captured particularly in chapter 1 of the Charter which states that: to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and

p.42.

²²² Charter of the United Nations (concluded 26 June 1945, entered into force 24 October 1945) 59 Stat. 1031; TS 993; 3 Bevans 1153.

²²³ UNGA Universal Declaration of Human Rights, UN Doc A/810 at 71 (1948).

encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.²²⁴ The Universal Declaration similarly points to the universality of rights. For example Article 1 of the Universal Declaration states that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Similarly Article 2 of the Universal Declaration states that *everyone* is entitled to all the rights and freedoms set forth in the declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Articles 28 and 29(1) of the Universal Declaration also prescribe to the universality of the rights contained therein in declaring that *everyone* is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised and that *everyone* has duties to the community in which alone the free and full development of his personality is possible. The universal application of development is applied not only to all people everywhere, in this present generation, but also for generations to come. This value can be seen in for example principle 2 of the Declaration of the United Nations Conference on the Human Environment (Stockholm declaration)¹⁹⁷²²²⁵ which declares that the "natural resources of the earth...be safeguarded for the benefit of present and future generations."

Human rights as the value against which development can be assessed has international acceptance. Human rights have been elaborated in various international instruments. Rights have been given more detail for example the rights of workers in

²²⁴ Charter of the United Nations (concluded 26 June 1945, entered into force 24 October 1945) 59 Stat. 1031; TS 993; 3 Bevans 1153 Chapter I, art 1(4). (5).

²²⁵ 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1.

various conventions of the International Labour Organisation, and the women's rights in the Convention on the Elimination of All Forms of Discrimination against Women 1979²²⁵ (CEDAW), and rights of children in the Convention on the Rights of the Child 1989²²⁷ (CRC).

The link between these various human rights and development has been made explicit. This can be seen in the Declaration on the Right to Development adopted by the General Assembly in December 1986²²⁸ (RTD). Article 1(1) of the Declaration on the Right to Development sets out the right to development as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized."

The Millennium Declaration 2000²²⁹, a consensual document between States provides the values which States have declared are essential to the achievement of development goals. There is freedom, which is the right held by men and women to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. There is equality whereby no individual and no nation must be denied the opportunity to benefit from development. There is solidarity whereby global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice and those who suffer or who benefit least deserve help from those who benefit most. There is tolerance, whereby human beings must respect one another, in all diversity of belief,

²²⁵ UNGA Convention on the Elimination of All Forms of Discrimination against Women, UN Doc A/34/46 (1979).

²²⁷ UNGA Convention on the Rights of the Child, UN Doc A/44/49 (1989).

²²⁸ UNGA Declaration on the Right to Development, UN Doc A/41/53 (1986).

culture and language, where differences within and between societies should neither be feared nor repressed, but cherished as a precious asset of humanity and where a culture of peace and dialogue among all civilisations should be actively promoted.

There is respect for nature whereby prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development. There is shared responsibility whereby responsibility for managing worldwide economic and social development must be shared among the nations of the world and should be exercised multilaterally with the United Nations as the most universal and most representative organisation in the world playing the central role.²³⁰

Sustainable development, as expressed in the Stockholm declaration 1972 and in the Rio Declaration on Environment and Development 1992²³¹ (Rio Declaration), is not only a goal but also contains several expressions of public value. One is its universal acceptance. Another is the implicit notion of equity between and within generations. For example in paragraph 6 of the Stockholm declaration of 1972, States declared that the human environment was to be defended and improved for 'present and future' generations, in other words intra- and inter- generational equity. Principles 5 and 6 of the Rio declaration 1992 captures the value of intragenerational equity very well by declaring that the disparities in standards of living must be decreased and that the special needs and situation of developing countries, particularly, the least developed countries are to be given special priority.

Equity has been declared as a value in numerous statements made by States to

²²⁹ UNGA United Nations Millennium Declaration, UN Doc A/55/L.2 (2000).

²³⁰ Ibid Part I, paragraph 6.

²³¹ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I).

narrow the gap between rich and poor nations. In the Stockholm declaration of 1972 it was recognised that most of the environmental problems are caused by under-development. Further the Stockholm declaration gave recognition to the fact that millions of people in the developing countries were living far below the minimum levels required for a decent human existence, lacking in adequate food and clothing, shelter and education, health and sanitation. The Stockholm declaration stated that for this purpose, industrialised countries should make efforts to reduce the gap between themselves and the developing countries.²³² Decreasing disparities in standards of living is repeated in the Rio Declaration 1992.²³³

Another public definition of equity is ensuring that the resources of the earth are employed for the benefit of all people. The Stockholm Declaration 1972 states that the benefits from the employment of non-renewable resources must be shared by all mankind.²³⁴

In *Denmark v Norway* (1993)²³⁵ the ICJ referred to intra-generational equity by speaking of the "need to consider the livelihood of dependent fishing communities" when drawing the maritime boundary between two States in an area of valuable fisheries resources. The ICJ in *Denmark v Norway* also employed intra-generational equity in referring to the *Gulf of Maine* (1984)²³⁶ case in which the court recognised the need to take into account the effects of the delimitation on the Parties' respective fishing activities by ensuring that the delimitation should not entail 'catastrophic' repercussions for the livelihood and economic well-being of the populations of the

²³² 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, preamble paragraph 4.

²³³ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I) principle 5.

²³⁴ 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1 principle 5.

²³⁵ *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen* [Denmark v Norway] [1993] ICJ 38.

countries concerned.

The International Court of Justice has also addressed intergenerational equity in *Denmark v. Norway*. Judge Weeramantry referred to intergenerational equity and specifically to "the concept of wise stewardship [of natural resources] ... and their conservation for the benefit of future generations..."²³⁷ It must be noted that Judge Weeramantry's statement was included in his separate concurring opinion as dicta, and were not decisive in the Court's decision regarding delimitation of a maritime boundary. Separate (and dissenting) opinions, such as those provided by Weeramantry in *Denmark v. Norway* are useful in offering interpretations on the subject matter and contribute to what many regard as the ICJ's role in developing and clarifying international law on controversial issues.²³⁸ By looking at such separate (and dissenting opinions) one can anticipate the direction the ICJ is likely to take if confronted with addressing directly the normative status of intergenerational equity.

Judge Weeramantry has also insisted upon the recognition of intergenerational equity as an international legal principle in his dissents in *Nuclear Tests Case (1995)*²³⁹ and in "*Nuclear Weapons Advisory Opinion*"²⁴⁰.

In his dissenting opinion in *Nuclear Tests Case*, Judge Weeramantry stated: "The case before the court raises, as no case before the court has done, the principle of intergenerational equity - an important and rapidly developing principle of contemporary

²³⁶ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ 246.

²³⁷ *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ, separate opinion of Judge Weeramantry at 211-279.

²³⁸ see Lauterpacht, H. (1958) *The Development of International Law By The International Court* Cambridge: Cambridge University Press at pp. 66-69.

²³⁹ See *Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*,

environmental law... The court has not thus far had occasion to make any pronouncement on this rapidly developing field . . . [The case] . . . raises in pointed form the possibility of damage to generations yet unborn."²⁴¹

in *Nuclear Weapons Advisory Opinion*, in which the ICJ was asked to hold whether the threat or use of nuclear weapons by a state was unlawful per se under international law, Judge Weeramantry stated:"at any level of discourse, it would be safe to pronounce that no one generation is entitled, for whatever purpose, to inflict such damage on succeeding generations . . . This Court, as the principal judicial organ of the United Nations, empowered to state and apply international law . . . must, in its jurisprudence, pay due recognition to the rights of future generations... [T]he rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations."

Intergenerational and intragenerational equity have also been addressed in a domestic case in a 1993 Philippine Supreme Court case involving State management of national forests: in *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*²⁴² petitioners (a class action by Filipino children) sought to halt cutting by government licensees of remaining national forests. Petitioners contended that present and continued logging violated their right to a healthy environment under the Philippine Constitution and would result in irreparable harm to them and future generations of the

[1995] ICJ 288, dissenting opinion by Judge Weeramantry at 341-342.

²⁴⁰ *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* [1996] ICJ 226.

²⁴¹ Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, [1995] ICJ 28 dissenting opinion by Judge Weeramantry at 341-342.

²⁴² *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* (1994)

nation. The Supreme Court expressly considered the issue of intergenerational responsibility and recognized that plaintiffs' had *locus standi* for their class action on behalf of present and future generations in the Philippines.²⁴³

This case is significant because it is not only passed by a nation's highest court but also addressed openly intergenerational equity as a factor in rendering its determination and particularly recognised *locus standi* for future generations to bring an action regarding environmental degradation.

The acceptance of the foregoing set of values is significant given the differences in views and concerns of the UN member states, and their differing values embedded in their own histories, political systems and different economic and social situations. There are large economic differences between rich, poor and transition countries. Historically, the differences could be seen between those major powers with colonies and the countries which were or had recently been colonies. In the 1970s with the advent of an increasing number of independent countries the differences became more stark between the industrial countries and the newly independent developing countries, the Group of 77. Against this backdrop, the consensus in values represented by the United Nations Charter and the Universal Declaration is indeed significant.

These values have been consistently reaffirmed, notably in the Declaration on the Right to Development (1986) and the United Nations Millennium Declaration (2000) by the heads of state and government of 147 States and representatives of some forty others.

³³ ILM 173.
²⁴³ *Ibid* p. 185.

5.3 Goals and Methods

One goal that has received acceptance by States is the acceleration of economic growth. The United Nations Development Decade: A programme for International Economic Co-operation declaration (First Development Decade in 1961) equated development to economic growth. The United Nations declaration of the First Development Decade 1961 called upon member States to "intensify their efforts to mobilise and to sustain support for measures..... to accelerate progress towards self sustaining growth of the economy of the individual nations..."²⁴⁴

According to the preamble of the declaration of the First Development Decade 1961 attests to the common good that would derive from the goal of the economic development of developing countries in stating that: "the economic.....development of the economically less developed countries is not only of primary importance to those countries but is also basic to the attainment of international peace and security and to a faster and *mutually beneficial increase in world prosperity*." In 1961 the goal was set for developing countries to increase growth rates to a minimum of 5% with each country setting its own target (General Assembly resolution 1710 (XVI), 19 December 1961, article 1) with a target date of 1970 for this goal to be achieved.²⁴⁵ In 1970 the goal was set for developing countries' GNP growth rate to average at least 6% with their GNP per capita growth rate averaging about 3.5% by the 1970s.²⁴⁶ In the 1980s a goal was set for the average annual GDP growth rate of developing countries as a whole to be 7% and in the early part of the decade to be as close as possible to

²⁴⁴ UNGA UN Development Decade: A programme for International Economic Co-operation UN Doc.A/5100 (1961), art 1.

²⁴⁵ *Ibid*.

²⁴⁶ UNGA International Development Strategy for the Second United Nations Development Decade UN Doc. A/RES/25/2626 (1970).

this rate.²⁴⁷ In the 1990s a goal was set for developing countries to sustain a GNP growth rate of 7% with growth objectives varying by country with the year 2000 as the target year for the achievement of this goal.²⁴⁸

Another goal is social development. Perhaps the first indications that development was beginning to encompass a broader spectrum than just economic development can be seen in the 1970 United Nations Declaration declaring the Second Development Decade. According to the 1970 United Nations Declaration on the Second Development Decade the goal of development includes expanding and improving facilities for education, health, nutrition, housing and social welfare.²⁴⁹ Social development includes goals in the areas of health and education. A goal was set in 1967 to eradicate smallpox (The Intensified Smallpox Eradication Programme was launched at the request of the Twentieth World Health Assembly to eradicate smallpox worldwide with a target of achieving this goal within 10 years, resolution WHA20.15). The last recorded smallpox case occurred in Somalia in October 1977. On May 1980, the World Health Assembly declared that smallpox eradication had been achieved.²⁵⁰ Another goal was the immunisation of 80% of the developing countries' children before their first birthday with the target of achieving this by the end of 1990²⁵¹. The proportion of 1 year-old children immunised against measles in the world was 74% in 1990 and the coverage for the combined three-dose vaccine against diphtheria,

²⁴⁷ UNGA Res 35/56 and Annex, A/35/592/Add. 1, (1, 5 December 1980).

²⁴⁸ UNGA International Development Strategy for the Fourth United Nations Development Decade, UN Doc. A/RES/45/199 (1990).

²⁴⁹ UNGA International Development Strategy for the Second United Nations Development Decade UN Doc. A/RES/25/2626 (1970) at 18.

²⁵⁰ Jolly R. et al., *UN Contributions to Development Thinking and Practice*, Bloomington, Indiana University Press, 2004, p. 262.

²⁵¹ Expanded Programme on Immunization, EPI, "World Health Assembly resolution WHA30.53, 19 May 1977.

peritiss and tetanus was 73% an increase from approximately 5% in the 1970s.²⁵²

Another goal was the eradication of poliomyelitis worldwide with a target of the year 2000²⁵³. Polio was reduced by 99% in the 1990s. According to the World Health

Organisation Global Polio Eradication Initiative Summary Report of

2001(Geneva:WHO, 2002). by the end of 2001 , the wild poliovirus was endemic in only 10 countries.

In the area of education, the General Assembly resolved to reduce illiteracy by two-thirds, or 350 million, of the then estimated 500 million illiterate adults in Africa, Asia and Latin America and for this to be achieved within a 10 year period.²⁵⁴

Another goal is sustainable development. Sustainable development as a goal encompasses three mutually reinforcing goals. These are economic development, social development and environmental protection. The Johannesburg Declaration and Plan of implementation 2002²⁵⁵ clearly identify economic development, social development and environmental protection as equal pillars of sustainable development.

An important method that States have declared, for the achievement of development is international trade. In the Monterrey Consensus 2002 States reaffirmed that a universal, rule-based, open, non-discriminatory and equitable multilateral trading system and trade liberalisation can promote economic growth and substantially stimulate development worldwide, benefiting countries at all stages of development.²⁵⁶

²⁵² Jolly R. et al.. *UN Contributions to Development Thinking and Practice*, Bloomington, Indiana University Press, 2004, p. 262.

²⁵³ (Forty-first World Health Assembly, World Health Assembly resolution 43/1988/REC/1, 13 May 1988).

²⁵⁴ UNGA World Campaign for Universal Literacy, UN Doc. A/RES/1837 (XVIII) (1963).

²⁵⁵ 'Johannesburg Declaration on Sustainable Development' (Johannesburg 26 August-4 September 2002) UN Doc A/CONF.199/20.

²⁵⁶ 'International Conference on Financing for Development' (Monterrey 18-22 March 2002) UN

States have recognised that international trade is an important external source of development financing as well being a significant source of employment.²⁵⁷

A method declared by States is integrating natural resource protection measures in their development planning.²⁵⁸ The World Charter for Nature 1982 requires States to make ecological planning an integral part of their development planning. Ecological planning entails formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature of proposed policies and activities.²⁵⁹

Another method is the development of domestic and international law. One area where the law has prominently developed is international environmental law. The World Charter for Nature 1982 declares that the principles contained in that Charter shall be reflected in the law and practice of each State and also in international law and practice.²⁶⁰

Another method is the implementation of environmental monitoring. States are to monitor natural processes, ecosystems and species with the aim of early detection of degradation or threat. Environmental monitoring also has the aim of ensuring timely intervention and facilitation of evaluation of conservation policies.²⁶¹

Another method is education, research and international cooperation. States are to

Doc A/CONF.198/11 paragraph 26.

²⁵⁷ *Ibid* paragraph 27.

²⁵⁸ UNGA Economic Development and the Conservation of Nature Declaration UN Doc A/RES/1831 (XVII) (1962).

²⁵⁹ UNGA World Charter for Nature UN Doc. A/RES/37/7 (1982) art 16.
²⁶⁰ *Ibid* art 14.

disseminate information on nature and ensure that ecological education is an integral part of general education.²⁶²

States are to promote scientific research and remove all restrictions on the dissemination of the results of such research.²⁶³

States as well as public authorities, international organisations, individuals, groups and corporations are to cooperate. These entities are to cooperate in conserving nature through common activities for example information exchange and consultations.²⁶⁴ They are also to establish common standards for example for products and manufacturing processes that may have adverse effects on nature and agreeing on methodologies for assessing these effects.²⁶⁵

States have agreed on a number of important targets and timetables for the achievement of the goal of sustainable development. The Johannesburg Plan of Implementation, World Summit for Sustainable Development (2002) set the goal of halving the number of people living in poverty, those who suffer from hunger and those without access to safe drinking water and sanitation by 2015.²⁶⁶ People whose income was below U.S. \$1 per day were regarded as living in poverty. With regard to the environment, States set the goal of sound management of chemicals and of ensuring that chemicals are used and produced so as to minimise adverse effects on human health and the environment by 2020, taking into account the precautionary approach.²⁶⁷ States also set the goal of maintaining and restoring fish stocks to maximum

²⁶¹ *ibid* art. 19.

²⁶² *ibid* art. 15.

²⁶³ *ibid* art. 18.

²⁶⁴ *ibid* art. 21(a).

²⁶⁵ *ibid* art. 21(b).

²⁶⁶ 'Johannesburg Declaration on Sustainable Development' (Johannesburg 25 August-4 September 2002) UN Doc A/CONF.199/20 paragraphs 6(a), 23, 38(a).

²⁶⁷ *ibid* paragraph 22.

sustainable yield levels by 2015.²⁶⁸ With regard to human health States set the goal of developing programs and initiatives to reduce rates of infant and child mortality by two-thirds and maternal rates by three-quarters using year 2000 figures as a baseline and all this to be achieved by 2015.²⁶⁹

One major method by which development goals are envisaged to be achieved is through official development assistance. As early as 1960, the General Assembly set a target for the flow of international development assistance and capital to reach 1% of GNP of the developed countries.²⁷⁰ With regard to the achievement of this target, the total flow of resources from the DAC countries in 1970 was 0.79% of the GNP.²⁷¹ With regard to financial resources transfers to developing countries, a target was set for actual disbursements to be a minimum: 1% of the GNP of each developed country and for this to be achieved by 1975 and each developed country to provide a minimum net amount of 0.7% of its GNP as ODA to the developing countries and for this to be achieved also by the mid 1970s. With regard to the achievement of this target of 1% of the GNP of each developed country transferred to developing countries, 9 out of 17 DAC countries surpassed this target in 1975. Total flow from the DAC countries in 1972 was 0.78% of the GNP and 1.17% of the GNP in 1975. By 1980, total flow had fallen to 1.04% with 11 of the DAC countries exceeding the goal. With regard to the achievement of 0.7% of each developed country's GNP as ODA to the developing countries average net ODA from the 17 DAC countries was 0.36% of GNP in 1975. Only Sweden (0.82%) and the Netherlands (0.75%) exceeded the goal. By 1980, DAC

²⁶⁸ *ibid* paragraphs 29(d) and 30(a).

²⁶⁹ *ibid* paragraph 47(f).

²⁷⁰ UNGA Accelerated flow of capital and technical assistance to the developing countries UN Doc A/RES/1522 (XV) (1960).

²⁷¹ Jolly R. et al., *UN Contributions to Development Thinking and Practice*, Bloomington, Indiana University Press, 2004, p. 260.

countries' ODA was 0.38% of GDP with Norway and the Netherlands also exceeding the goal.²⁷²

5.4 Prohibitions and Permissions

States have a duty to ensure that their citizens have access to information concerning the environment that is held by public authorities. Information includes that regarding hazardous materials and activities in their communities.²⁷³

States have an obligation to ensure public participation in environmental decisions that affect them.²⁷⁴

States have the duty to ensure that citizens have access to judicial and administrative proceedings with regard to environmental issues that concern them.²⁷⁵ States must in this regard also adopt legislation regarding liability and compensation for the victims of pollution and environmental damage.²⁷⁶

States have an obligation to protect their environments.²⁷⁷ States must use all measures to protect their environments. For example States must implement specific legislation to protect the environment.²⁷⁸ Planning for economic development must also

²⁷² *ibid.*

²⁷³ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 10.

²⁷⁴ *ibid* principles 10, 20, 21, 22.

²⁷⁵ *ibid* principle 10.

²⁷⁶ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I) Principle 13. Also, Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 art 14.2 and 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev. 1, principle 22.

²⁷⁷ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 4.

²⁷⁸ *ibid* principles 3 and 11. Also Convention on Biological Diversity (adopted 5 June 1992,

include protection of the environment, for example principle 4 of the Stockholm declaration 1972 declares that economic development planning must include nature conservation including wildlife).

Protecting the environment also entails that natural resources shall not be wasted. For example the World Charter for Nature declares the following rules in ensuring that natural resources are not wasted: living resources are not to be utilised in excess of natural capacity for regeneration; the productivity of soils is to be maintained or enhanced through measures which safeguard their long-term fertility and the process of organic decomposition, and prevent erosion and all other forms of degradation; resources including water, which are not consumed are to reused or recycled; non-renewable resources which are consumed as they are used are to be exploited with restraint with due consideration to their abundance, the rational possibilities of converting them for consumption, and the compatibility of their exploitation with the functioning of natural systems.²⁷⁹

Protecting the environment also entails conserving nature. For example The World Charter for Nature 1982 declares that "agriculture, grazing, forestry and fisheries practices shall be adapted to the natural characteristics and constraints of given areas."²⁸⁰ States also have an obligation to rehabilitate for purposes in accordance with their natural potential and in compatibility with the well-being of affected populations, areas that have been degraded by human activities.²⁸¹

entered into force 29 December 1993) 1760 UNTS 79 art 6 and United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art 3.1.

²⁷⁹ UNGA World Charter for Nature UN Doc. A/RES/37/7 (1982) art 10.
²⁸⁰ *ibid* art 11. d.

²⁸¹ *ibid* art 11. e.

The obligation to protect the environment also entails that States must implement the polluter pays principle,²⁸² that is, internalising costs to the environment by charging the economic intermediary e.g. a corporation, all the environmental costs that their activity created through for instance ecotaxes.

States also have a duty to carry out environmental impact assessments in drawing up public policies or in making decisions that affect individuals.²⁸³ Environmental impact assessments are to be carried out whenever an envisaged development activity might have an impact on nature and requires that the best available technologies are employed to minimise adverse effects to nature.²⁸⁴ The assessment is a study of the consequences of a proposed development activity.²⁸⁵ Further the study of the consequences of a proposed development activity must be carried out sufficiently in advance and if the activity is to be undertaken, it must be planned and carried out in such a way as to minimise potential adverse effects.²⁸⁶ States' obligation to assess the environmental impact of development projects entails putting in place assessment procedures that aim to prevent or minimise environmental damage rather than simply addressing problems after the fact. The obligation involves screening projects for their environmental impacts and if necessary subjecting them to more detailed environmental assessment. The obligation to assess the environmental impact of development projects can also be seen in the Stockholm declaration.²⁸⁷

²⁸² Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 16.

²⁸³ *Ibid* principle 17.

²⁸⁴ UNGA World Charter for Nature UN Doc. A/RES/37/7 (1982) art 11.

²⁸⁵ *Ibid* art 11.c.

²⁸⁶ *Ibid*.

²⁸⁷ Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 11 and for example

The onus lies on the proponents of a proposed development activity to demonstrate that expected benefits outweigh potential damage to nature. Where potential adverse effects are not fully understood, the activity is not to proceed.²⁸⁸

The obligation also entails that States adopt a precautionary approach, that is, they must prevent environmental degradation even in the face of uncertainties as to their real occurrence and must eliminate patterns of production and consumption that in the long term are not sustainable.²⁸⁹ This obligation is repeated in various other declarations: for example the World Charter for Nature 1982 declares that "activities that are *likely* to cause irreversible damage to nature shall be avoided."²⁹⁰

A corollary to the obligation to protect the environment is the obligation to make resources available to preserve and improve the environment. The resources would foreseeably be those that allow for the identification, assessment and resolving of environmental and natural resource problems. There would need to be trained personnel and institutions in place for ecological, social and natural resource management. There would need to be appropriate environmental legislation. There would also need to be environmental education and training programs and adequate information networks. The obligation also encompasses the compilation of natural resource inventories, accounting mechanisms and other measures to identify and take into account ecological conditions and changes. The obligations also include the establishment and promotion of programs for the protection, conservation and rehabilitation of natural resources and the environment. For example, programs would

recommendation 61 in its action plan.

²⁸⁸ UNGA World Charter for Nature UN Doc. A/RES/37/7 (1982) art 11.b.

²⁸⁹ Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 8.

include those that address desertification, deforestation, soil loss, conservation of living resources and biological diversity both within and outside national jurisdictions. This obligation to make resources available to preserve and improve the environment is found in a number of declarations, most notably in the Stockholm declaration 1972 and its accompanying Action Plan.²⁹¹

The obligation to protect the environment is dependent on the environmental and developmental context i.e. it is recognised that what may apply in a developed country may be of unwarranted economic and social cost to particularly developing countries.²⁹² Further, States have recognised that there are differing contributions to global environmental degradation with developed countries acknowledging the greater responsibility they bear in view of the pressures their societies place on the global environment and of the technologies and financial resources they possess in comparison to developing countries.²⁹³

States have a duty to integrate environmental considerations into development policies. According to the Stockholm declaration 1972, States are to adopt an integrated and coordinated approach to their development planning with the aim of ensuring that development is compatible with the need to protect and improve the environment²⁹⁴. Further the Stockholm declaration states that this development planning is to serve as a tool for reconciling any conflict between the needs of development and the need to

²⁹⁰ UNGA World Charter for Nature UN Doc. A/RES/37/7 (1982) art 11.a.

²⁹¹ 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 12 and recommendations 69-108 of the Action Plan.

²⁹² 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992)

UN Doc A/CONF.151/26 (vol. I), principles 6 and 11.

²⁹³ *Ibid* Principle 7.

²⁹⁴ 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5

protect and improve the environment.²⁹⁵ A number of other declarations reiterate this duty to integrate environmental consideration into development policies. For example the Nairobi declaration 1982 asserts that a comprehensive and regionally integrated approach that focuses on the interrelationship between the environment, development, population and resources can lead to environmentally sound and sustainable socio-economic development the interrelationship between the environment, development, population (Nairobi declaration 1982, Article 3). Similarly, the World Charter for Nature 1982 declares that States, in formulating plans for economic development and population growth shall take into account the long-term capacity of natural systems to ensure the subsistence and settlement of the populations concerned.²⁹⁶

States have an obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.²⁹⁷ For example States are prohibited from discharging toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless.²⁹⁸ States must also notify other States in the case of emergencies and activities with significant transboundary effects²⁹⁹ (two Conventions dealing entirely with cooperation in case of emergencies are the two Helsinki Conventions of 17 March

June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 13.

²⁹⁵ *Ibid* principle 14.

²⁹⁶ UNGA World Charter for Nature UN Doc. A/RES/37/7 (1982) at 17.

²⁹⁷ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 14; also 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1 principle 21.

²⁹⁸ 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1 principle 6.

²⁹⁹ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I) principles 18 and 19; Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 78, art 14.1 (d) and (e) : United Nations Convention on the Law of Sea (adopted 10 December 1982, entered into

1992: Transboundary Effects of Industrial Accidents and Protection and Use of Transboundary Watercourses and International Lakes). This obligation is also found in general international law where in the *Corfu Channel case*³⁰⁰ the ICJ ruled that Albania should have notified the United Kingdom of the existence of dangerous mines affecting the UK's international right of transit.

States have the sovereign right to exploit their own resources in accordance with their own environmental and developmental policies.³⁰¹ This right is rooted in notions of self-determination and sovereignty. A State's sovereign right to exploit its own resources has been consistently affirmed in a number of resolutions going as far back as the 1960s as can be seen in for example the UN General Assembly Resolution on Permanent Sovereignty Over Natural Resources.³⁰² A prohibition can thus be inferred for States not to interfere with other States' right to exploit their own resources in accordance with their own environmental and developmental policies. For example, States cannot claim that natural resources are part of the global 'commons' over which every State should have a right of influence. In fact this notion that a State's sovereign right is not an absolute one but must be read in connection with a State's obligation to not cause harm to the environment of other States can be seen clearly in the Stockholm declaration 1972 which declares that "States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national

force 16 November 1994) 1833 UNTS 3, art 198.

³⁰⁰ *Corfu Channel Case (UK v Albania)* [1948] ICJ Reports 15.

³⁰¹ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 2.

5.5 Institutional Implications

In order to achieve the goal of economic development a number of institutions and programs have been established. Key among these are the United Nations Development Programme (UNDP), the United Nations Organisation for Industrial Development (UNIDO), the Food and Agricultural Organisation of the United Nations (FAO), the United Nations Educational, Scientific, and Cultural Organisation (UNESCO), and the United Nations Conference on Trade and Development (UNCTAD). There are also important multilateral and bilateral development institutions. There is the World Bank, which was created for the purpose of financing development activities (The World Bank consists of three interrelated but legally distinct institutions i.e. the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), and the International Finance Corporation (IFC). According to article I of the Articles of Agreement of the International Bank for Reconstruction and Development the IBRD provides loans for productive purposes. The IFC whilst having the same purposes as the IBRD, was created in 1956 to stimulate private sector investment in developing countries. Similarly, the IDA whilst having the same purposes as the IBRD, was established in 1960 to provide development financing on a more concessional basis. Important regional development banks include the Inter-American Development Bank established in 1959, the African Development Bank established in 1963, and the Asian Development Bank established in 1965. At the same time, a number of developed countries have established a

³⁰² UNGA Permanent Sovereignty Over Natural Resources UN Doc. A/5217 (1962).

³⁰³ 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5

specialised agency with a mandate to allocate and distribute development assistance.

Another key institution is the United Nations Environment Programme (UNEP) which was created to coordinate the Action Plan of the Stockholm declaration 1972. Broadly, UNEP coordinates three areas identified in the Action Plan of the Stockholm declaration: environmental assessment or "Earth Watch" which encompasses monitoring and collecting environmental data with an International Referral System providing information on environmental problems and a Global Environmental Monitoring System furthering the understanding of global environmental conditions. There is also an International Register of Potentially Toxic Chemicals; environmental management which concerns strategies for environmental planning and rational natural resource use and rehabilitation; supporting measures which include environmental training, public education, organisational and financial arrangements.

There are a number of institutional actors that have been given special responsibility for the development agenda. There are specific units of the United Nations secretariat with a development mandate. Development programs are also undertaken by UNDP and UNICEF under the flag of the United Nations. Independent development programs are undertaken by specialised agencies, for example, the World Health Organisation (WHO), International Labor Organisation (ILO) and the Food and Agricultural Organisation (FAO). Other agencies with their mission being specifically development, include the International Fund for Agricultural Development (IFAD). There are also research institutions focused on development, for example the United Nations Research Institute for Social Development (UNRISD). There are also regional economic commissions, for example, the U.N.Economic Commission for Africa (UN

ECA). Another key institutional actor is UNCTAD. Outside the United Nations a round of negotiations in the World Trade Organisation, the Doha round, has been framed a development round, making the WTO an important development actor.

5.6 Conclusion

To summarise, declaratory international development law consists of values, goals and methods. Human rights are the main value by which development is to be assessed. The link between human rights and development has been made explicit particularly in the Declaration on the Right to Development (1986). Another important value is equity. Equity is the basis of goals towards narrowing the gap between rich and poor countries as declared for example in the Stockholm declaration of 1972 and repeated in the Rio Declaration of 1992. Other important values are freedom, equality, solidarity, tolerance, respect for nature and shared responsibility. Development goals cover economic, social and environmental spheres with specific targets and timetables for their achievement set. States have declared the methods by which these goals are to be achieved, namely, international trade; integrating natural resource protection measures in their development planning; development of domestic and international law; implementation of environmental monitoring; education, research and international cooperation; and crucially, through official development assistance. There are also important institutions that have been established to coordinate development goals, including the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP).

There are also prohibitions and permissions setting out what States must or must not do for the attainment of development goals. States have a duty to ensure public

participation in decision making. States have a duty to protect their environments and to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Protecting the environment entails carrying out environmental impact assessments and adopting a precautionary approach i.e. they must prevent environmental degradation even in the face of uncertainties as to their real occurrence. States have the sovereign right to exploit their own resources in accordance with their own environmental and developmental policies.

The underlying principle of the declared prohibitions and permissions is that of common and differentiated responsibilities. Responsibilities are common but differentiated. Differentiation is on the basis of some countries generally, being richer than others. In the Rio declaration (1992) the developed countries acknowledged the responsibility they bear in the international goal of sustainable development given the pressures their societies place on the global environment and of the technologies and financial resources they command.³⁰⁴

Differentiation of responsibilities can be on the basis of financial and technical contributions to meet the costs of compliance or as a requirement for participation. The Stockholm Declaration 1972 endorsed the provision of additional international technical and financial assistance to developing countries for the purpose of incorporating environmental safeguards into their development planning.³⁰⁵

³⁰⁴ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 7.

³⁰⁵ 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 12.

We might identify four central pillars of a declaratory law of development that would be recognised in adjudicative procedures, and that are being used by dispute resolution bodies in judging between states. There is intra-generational equity, inter-generational equity, sustainable development and differentiation of responsibilities.

International development law is not only aspirational and declaratory law, there is also hard development law. It is to hard development law that I will now turn in the next chapter.

CHAPTER 6:

HARD DEVELOPMENT LAW

6.1 Introduction

This Chapter will demonstrate and analyse the primary rules of obligation and the secondary rules of development law, based on Hart's conception of law as a union of primary and secondary rules. A good example of hard development law is the development law arising from the World Trade Organisation (WTO). To recap, primary rules are concerned with the actions that must or must not be done. The act to be done, or not to be done, must be clearly expressed so as to be identifiable. In other words we must be able to identify an "act" that is permitted or forbidden. The rights-holders and duty-bearers must also be clearly identifiable. Secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined. Hart called these secondary rules, the rule of recognition; the rule of change; and the rule of adjudication. A rule of recognition is a rule for conclusive identification of primary rules of obligation. It specifies some feature or features, possession of which is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. It operates to identify a given rule as possessing the required feature of being an item on an authoritative list of rules- this forms the basis of the idea of legal validity. Where a rule of recognition is accepted, private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. A rule of change in its simplest form empowers individuals or a body of persons to introduce new primary rules for the conduct of the life of the

group, or of some class within it, and to eliminate old rules. Rules of change may besides specifying persons who are to introduce new primary rules or to eliminate old ones, define the procedure to be followed in the introduction of new primary rules or in the elimination of old primary rules. A rule of adjudication empowers individuals to make authoritative determinations of the question whether on a particular occasion, a primary rule has been broken. In addition to identifying the individuals who are to adjudicate, such rules also define the procedure to be followed. These rules confer judicial powers and a special status on judicial declarations about the breach of obligations. Rules of adjudication are necessarily also committed to a rule of recognition of an elementary and imperfect sort i.e. if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. In this latter regard, this means that the pronouncements of the WTO adjudicatory bodies i.e. once adopted by the Dispute Settlement Body (DSB), must be taken as authoritative determinations of what the rules are. This chapter will relate each of these to development law in turn.

6.2 Primary Rules

The obligation to provide duty-free and quota free market access:

Developed countries have an obligation to provide duty-free and quota free market access to least-developed countries. This obligation can be found in the Decision on Measures in Favour of Least-Developed Countries.³⁰⁵ The duty bearers i.e. developed

³⁰⁵ Decision on Measures in Favour of Least-developed Countries (15 April 1994) LT/UR/D-1/3 <http://docsonline.wto.org/> (accessed 22 August 2014).

countries (and developing countries in a position to do so), and the rights holders i.e. least developed countries are clearly identifiable. It is also very clear what the obligation is, namely, to provide duty-free and quota free market access. The 'hardness' of this obligation is also demonstrated by being established on a "permanent basis". The obligation is also quite precise in that it set out a deadline of the year 2008 (and no later than the start of the Doha implementation period), by which the obligation must be fulfilled.

The Decision on Measures in Favour of Least-Developed Countries, allows for those Members who face difficulties in providing market access as set out above, to provide duty-free and quota-free market access for at least 97 per cent of products originating from LDCs, defined at the tariff line level. Again the fulfillment of the obligation had a deadline of 2008 or no later than the start of the Doha implementation period.

Exceptions to general GATT/WTO obligations:

The Enabling Clause:

The Decision titled, "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (1979)",³⁰⁷ more commonly called the "Enabling Clause" provides developing countries with the legal right to suspend, without having to request a waiver from the most-favoured-nation treatment as per Article I of the GATT 1994. The Enabling clause gives a legal right to developed countries to accord more favourable treatment to developing countries within the framework of regional or global arrangements. This right is a conditional and transitional one as it is subject to the

³⁰⁷ Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (adopted 28 November 1979) GATT BISD, 26th Supp. 203, GATT Doc L/4903.

principle of "graduation" according to paras 3.b. and 7, but a right nonetheless.

The obligation to abstain from applying safeguard measures to a product originating in a developing country:

Article 9 of the Safeguards Agreement states:³⁰⁸ Firstly, Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned. Secondly, a developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7.³⁰⁹ Notwithstanding the provisions of paragraph 5 of Article 7,³¹⁰ a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.

The Safeguards Agreement in general, is an exception to the general rule of non-

³⁰⁸ Agreement on Safeguards (15 April 2014) LT/UR/A-1A/8 <http://docsonline.wto.org> (accessed 25 August 2014) art 9.

³⁰⁹ Paragraph 3 of art 7 of the Agreement on Safeguards states: "the total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years".

³¹⁰ Paragraph 5 of art 7 of the Agreement on Safeguards states: "no safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, for a period of time equal to that during

discrimination in the GATT. The Safeguard Agreement allows a member country to impose import restrictions if the imported products causes or threatens to cause "serious injury to the domestic industry that produces like or directly competitive products". The Safeguards Agreement defines procedures for applying such measures.

Article 9 of the Safeguards Agreement however, establishes substantive and procedural criteria for applying safeguard measures against a developing country specifically, and facilitates their use of such measures. Article 9 is formulated in clear language and establishes a legally enforceable right for developing countries. The first part of Article 9 of the Safeguards Agreement stipulates an obligation on developed countries to abstain from applying safeguard measures on products originating from a developing country as long as the developing country's share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned. Article 9 also provides a clearly identifiable permissible act, a right held by developing countries to extend the period of application of a safeguard measure within the conditions set in Article 9. The duty bearers are clearly identified in Article 9 as being developed countries, and the rights holders developing countries.

In *US-Line Pipe*,³¹¹ Korea contended that the United States' measure and procedures were inconsistent with, inter alia, Article 9.1 of the Safeguard Agreement, since the United States had imposed its measure on all countries (except Mexico and Canada),

which such measure had been previously applied, provided that the period of non-application is at least two years."

³¹¹ *United States – Line Pipe, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R 639.

including those that were exempted according to Article 9.1 of the Safeguard Agreement, including Korea. Thus Korea claimed that the United States violated Article 9.1 because it did not determine which developing countries were to be exempted from the measure. Korea claimed that the United States treated developing countries, regardless of their prior import levels, as equal to all suppliers, and assigned them each the same 9,000 short tons quota applied for other suppliers. The United States argued that the defined quota satisfied Article 9.1 of the Safeguard Agreement criteria. The Panel found that the United States measure was imposed inconsistently with Article 9.1. The Panel found that Article 9.1 of the Safeguard Agreement requires that the excluded countries must be explicitly mentioned. The Panel also examined whether the measure applied to all developing countries. The Panel examined the text of the measure, two United States documents and the United States' two notifications to the WTO. The Panel found that in none of these documents was there a reference to Article 9.1 of the Safeguard Agreement. This, according to the Panel proved the general applicability of the measure, which contrasts with the explicit exclusion of Mexico and Canada. The Panel thus found that the measure applied to all developing countries and therefore was inconsistent with Article 9.1 of the Safeguards Agreement. The United States appealed against the Panel's finding and interpretation of Article 9.1. The Appellate Body however, upheld the Panel's finding.

Another case where Article 9.1. of the Safeguards Agreement was raised was in *US-Steel Safeguards*,³¹² however it was raised in this case as a secondary claim. As the Panel had already found the United States' measures to be inconsistent with the Safeguards Agreement, it exercised judicial economy and did not examine the

³¹² *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (10 December 2003) WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R as modified by the Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R,

measure's consistency with Article 9.1 of the Safeguards Agreement. In sum, in *US-Line Pipe* both the Panel and the Appellate body found that Article 9.1 of the Safeguards Agreement was legally enforceable and found that the United States had acted inconsistently by not exempting the required amount of Korea's exports from the application of its safeguard measure. The Appellate Body's report reads as follows:

(W)e start by observing that Article 9.1 obliges Members not to apply a safeguard measure against products originating in developing countries whose individual exports are below a *de minimis* level of three per cent of the imports of that product, provided that the collective import share of such developing countries does not account for more than nine per cent of the total imports of that product...we find that the line pipe measure has been applied against products originating in those developing countries whose imports into the United States are below the *de minimis* levels set out in Article 9.1. And, consequently, we uphold the Panel's findings of its Report, that the United States acted inconsistently with its obligations under Article 9.1 of the Agreement on Safeguards.³¹³

Article 27-Agreement on Subsidies and Countervailing measures:

Under Article 27 of the Agreement on Subsidies and Countervailing measures,³¹⁴ LDCs and developing countries whose GDPs per capita are less than \$1,000 are exempted from the prohibition against export subsidies, provided that they do not attain export competitiveness in a particular product for two consecutive years. A country is deemed

WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R.

³¹³ *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* WT/DS202/AB/R.

³¹⁴ Agreement on Subsidies and Countervailing Measures (15 April 1994) L/T/UR/A-1A/9 art 27.

to have attained export competitiveness in a given product when its share reaches 3.25 percent of world trade for two consecutive years. Other developing countries are expected to phase out export subsidies within eight years of the coming into force of the WTO Agreements. However, upon request they could be granted a further two-year extension. Developed countries were given three years within which to phase out their export subsidies. The issue of Article 27 of the Agreement on Subsidies and Countervailing measures as a legal right for developing countries arose in *Brazil-Export Financing Programme for Aircraft*.³¹⁵ Brazil, as a developing country was alleged to have given prohibited export subsidies. Brazil contended, inter alia, that even if it was providing prohibited export subsidies, Article 27 of the Agreement on Subsidies and Countervailing measures accorded it the right to provide such subsidies for a period of eight years from the date of entry into force of the WTO agreement. Canada, the complainant in the case, contended otherwise, and argued that Brazil was in breach of Article 3 of the Agreement on Subsidies and Countervailing measures, and because Article 27 was an exception to the former. Brazil had the burden of proof in establishing that it was in conformity with the provisions of Article 27. The following was Brazil's response to the Canadian submission: ...the clearly stated object and purpose of Article 27 is to provide special and differential treatment to developing country members. Its context is made clear from its first paragraph which states without qualification that, "members recognise that subsidies may play an important role in economic development programmes of developing country members." The Article consists of carefully negotiated language that reflects a carefully drawn balance of rights and obligations of Members. Its text states explicitly and unequivocally that "the prohibition

<http://docsonline.wto.org> (accessed 25 August 2014).

³¹⁵ *Brazil – Export Financing for Aircraft* (20 August 1999) WT/DS46/R as modified by the Appellate Body Report WT/DS46/AB/R.

of paragraph 1(a) of Article 3 shall not apply" to developing countries, subject to specified conditions. It is the burden of Canada, as the complaining party, to establish that Brazil has not complied with these conditions. The panel upheld Brazil's contention on this point as follows:there will be no inconsistency with a given provision if a Member is explicitly excluded from its scope of application or a situation is explicitly identified in the text of the Agreement as falling outside the scope of application of a particular provision. In this regard, we recall that Article 27.2(b) states that: "The prohibition of paragraph 1(a) of Article 3 shall not apply to....other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4. Clearly on the basis of the plain meaning of the text of the provision, developing country members (other than those referred to in Annex VI) that are in compliance with the provisions of Article 27.4-do not fall within the scope of application of the prohibition contained in Article 3.1(a) until 1 January 2003."³¹⁶ The Appellate body upheld the panel's conclusion that even though Article 27 was an exception, it was an exception that qualified the main obligations, and therefore it was for Canada to prove that Brazil did not comply with the requirements of Article 27. In *Brazil-Aircraft* The Panel stressed that Article 27.4 of the Agreement on Subsidies and Countervailing measures (SCM Agreement) does not necessarily form the legal basis for a separate claim of violation of the Agreement on Subsidies and Countervailing measures, but rather that because of the explicit textual link found in Article 27.2(b) between Articles 3.1(a), 27.2(b) and 27.4, the requirements of Article 27.4 were to be considered in conjunction with Article 3.1(a) of the SCM Agreement in order to establish a claim of violation of that provision against a Member that is a developing country Member within the meaning of Article

³¹⁶ WT/DS46/R, paragraph 7.50 at 92.

27.2(b).

The right contained in Article 27 is a conditional right. In *Brazil-Aircraft* the appellate body held that paragraph 4 of Article 27 of the Agreement on Subsidies and Countervailing measures provides certain conditions or obligations that developing country Members must fulfill if they are to benefit from the special and differential treatment during the stipulated transitional period. The appellate body in *Brazil-Aircraft* stated that "...on reading paragraphs 2(b) and 4 of Article 27 together, it is clear that the conditions set forth in paragraph 4 are *positive obligations* for developing country Members..." The Panel in *Brazil-Aircraft* consistent with the appellate body finding, also stated that Article 27.4 does impose certain obligations, i.e., the obligation on developing country Members within the meaning of Article 27.2(b) to "phase out its export subsidies within the eight-year period, preferably in a progressive manner"; to "not increase the level of its export subsidies" and "to eliminate them within a period shorter than [eight years] when the use of such export subsidies is inconsistent with its development needs".

Article XVIII.B of the GATT 1994:

Section B of Article XVIII of the GATT 1994 states that a developing country, "in order to safeguard its position and to ensure a level of reserves adequate for the implementation of its programme of economic development, (...) may (...) control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported within a defined reasonable threshold and if the measures fulfil certain criteria."³¹⁷ The first issue then is to identify the primary rule, that act which is permitted or forbidden. Permissible market protective measures according to Article XVIII are:

quantitative restrictions to trade for balance of payment purposes, tariff increases on imports to protect infant industry, (and broad flexibility in policy options). The conditions which justify the intensification or institution of balance-of-payments restrictions under Article XVIII:9 (a) and (b) are a threat of a serious decline in monetary reserves, a serious decline in monetary reserves, or inadequate monetary reserves. The rights holders according to the text of Article XVIII are those contracting parties the economies of which "can only support low standards of living" and "are in the early stages of development." In practice the provision has been applied to developing countries generally. An instance when this provision was invoked is *India-Quantitative*

*Restrictions.*³¹⁸

LDCs:

Under the Agreement on Trade-Related Investment Measures (TRIMS),³¹⁹ LDCs have a right to maintain on a temporary basis existing measures that deviate from their obligations under the TRIMS Agreement. LDCs have a right to maintain existing measures until the end of a new transition period, lasting seven years. The transition period can be extended by the Council for Trade in Goods (CTG) under the procedures stipulated in the TRIMS Agreement, taking into account the individual financial, trade, and development needs of the LDC in question. LDCs also have a right to introduce new measures that deviate from their obligations under the TRIMS Agreement. These new measures need to be notified to the CTG no later than six months after their adoption. The CTG is required to give positive consideration to such notifications, taking into account the individual financial, trade and development needs of the

³¹⁷ General Agreement on Tariffs and Trade 1994 (15 April 1994) LT/UR/A-1A/1/GATT/1 art 18.

³¹⁸ *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (22 September 1999) WT/DS90/R as upheld by the Appellate Body Report WT/DS90/AB/R.

³¹⁹ Agreement on Trade Related Investment Measures (16 April 1994) LT/UR/A-1A/13 <http://docsonline.wto.org> (accessed 25 August 2014).

Member in question. The duration of these measures is not to exceed five years, renewable subject to review and decision by the CTG. The measures adopted under this decision are required to be phased out by the year 2020.

Under the Agreement on Agriculture,³²⁰ LDCs were exempted from making any reduction commitments, whilst developing and developed countries undertook reduction commitments.

Common but differentiated obligations: "lesser" obligations:

Article 6.4 of the Agreement on Agriculture states:³²¹

6.4 (a) A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:

- (i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 percent of that Member's total value of production of a basic agricultural product during the relevant year; and
- (ii) non-product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 percent of the value of that Member's total agricultural production.

(b) For developing country Members, the *de minimis* percentage under this paragraph shall be 10 percent

The relevant section is part 6.4(b) which is framed in clear language and establishes a

³²⁰ Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 <http://docsonline.wto.org> (accessed 25 August 2014).

right (in terms of a permissible act) for developing countries. This Article was invoked by Korea in *Korea-Various Measures on Beef*.³²² Australia and the United States claimed that Korea, *inter alia*, provided domestic support to its cattle industry in amounts which caused it to exceed its aggregate measure of support as reflected in Korea's schedule, thus violating Article 6 of the Agreement on Agriculture. In defence, Korea invoked Article 6.4(b) of the Agreement on Agriculture. Korea argued that its domestic support for the products in the dispute was below the 10% *de minimis* set in Article 6.4(b). Australia and the United States argued that Korea had miscalculated its support as it had not included all its support to beef producers as was required by Annex III of the Agreement on Agriculture and the Modality Paper. The Panel upheld the complaining parties' contention and applied the calculations as provided by New Zealand which was a third party in the dispute. The Panel found that the actual percentage was higher than the permitted 10%. Korea appealed the panel's finding on the calculation of the domestic support claiming that the Panel had mistakenly looked to Annex 3 of the Agreement on Agriculture to calculate the "current" AMS for beef, failing to rely instead on the "constituent data and methodology" provided in Korea's Schedule as required by Articles 1(a)(ii) and 1(h)(ii). The Appellate body looked at Korea's commitment and recalculated its domestic support based on the data Korea had provided. It then compared Korea's support with its commitment and found that Korea had not exceeded its total level of commitments and the allowed *de minimis* level. The Appellate body, however, also found that it lacked sufficient information on Korea's support for beef and thus it could not rule on whether Korea was violating its obligation and Article 6 of the Agreement on Agriculture. Although this double ruling does little to

³²² *ibid* art 6.4 <http://docsonline.wto.org> (accessed 25 August 2014).

³²² Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (10 January 2001) WT/DS161/R, WT/DS169/R as modified by the Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R.

clarify the workings of Article 6.4, *Korea-Various Measures on Beef* illustrates the justifiability and enforceability of Article 6.4(b). It supports the argument that there are circumstances when the right provided to developing countries under Article 6.4(b) may be upheld.

Under the Agreement on Agriculture, developing countries undertook "lesser" commitments than developed countries. For example, under the Agreement on Agriculture, developing countries are obliged to reduce their tariffs on average by 24 per cent over 10 years, whilst developed countries are required to reduce their tariffs by 36 per cent over 6 years. Developing countries are required to make at least a 10 per cent reduction on each tariff line, whilst developed countries are expected to make a minimum reduction of 15 per cent on each tariff line. With regard to trade-distorting domestic support measures, developing countries are required to reduce such measures by 13.3 per cent over 10 years, whilst developed countries are required to reduce such measures by 20 per cent over 10 years. With regard to export subsidies, developing countries are required to reduce their value and volume by 24 per cent and 14 per cent respectively, over 10 years, whilst developed countries are required to reduce by 21 per cent and 36 per cent, respectively, over 6 years. These provisions in the Agreement on Agriculture are legal rights (in the sense of permissible acts) accorded to developing countries—a developing country cannot be compelled to undertake more obligations than are actually provided for under the Agreement. Similarly, developing countries cannot be compelled to implement their obligations earlier than the time envisaged under the agreement.

Transition time periods:

An example of a transition time period provision is Article 65 of TRIPS³²³ which provides that a developing country member is entitled to delay for a further period of 4 years from the date of application, of the provisions of the TRIPS Agreement other than Articles 3, 4 and 5 (Article 65.2). To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years. This article is clearly formulated and accords developing countries a legal right. The Article was invoked in *India-Patents*,³²⁴ albeit, unsuccessfully. In *India-Patents* the US requested consultations with India concerning the alleged absence of patent protection for pharmaceutical and chemical products in India, which, according to the US, violated Articles 27, 65, and 70 of the TRIPS. In response, India claimed that Article 70.8 of the TRIPS must be interpreted in the context of Article 65. India claimed that the "rationale of Articles 65 and 70 was clearly to permit developing country Members to postpone changes in their law that other Members were required to make under Article 27 of the TRIPS Agreement". India contended that the United States' interpretation of Articles 70.8 and 70.9, therefore, effectively turned transitional arrangements designed to create a special benefit in respect of pharmaceutical and agricultural chemical products into a source of an additional burden. The panel found

³²³ Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) L.T./UR/A-1C/IP/1 art 65.

³²⁴ *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (16 January 1998) WT/DS50/R as modified by the Appellate Body Report WT/DS50/AB/R.
India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (22 September 1998) WT/DS79/R.

that the transition period as provided for in Article 65.2 of TRIPS did not cover India's obligation under Article 70.8(a) of TRIPS. The Panel concluded that "the lack of legal security in the operation of the mailbox system in India is such that the system cannot adequately achieve the object and purpose of Article 70.8 and protect legitimate expectations contained therein for inventors of pharmaceutical and agricultural chemical products. The panel therefore found that India had not fulfilled its obligation.

6.3 Secondary Rules

Hart's conceptualisation is particularly associated with the 'secondary law', which includes the rules by which laws are recognised, the rules by which they are changed, and the rules by which they are adjudicated. Each of these are well-developed within the WTO system, and provide a solid basis in a 'hard' law of development.

Rule of Recognition:

To identify the 'rule of recognition' in the WTO we look to the source(s) of WTO Law. The WTO Agreement, mentions in various places that the covered agreements are the sources of law. Articles 1 and 7 of the Dispute Settlement Understanding make it clear that the covered agreements constitute the prime input for the work by the WTO adjudicating bodies. Further, Appendix 1 to the Dispute Settlement Understanding gives an exhaustive list of all covered agreements. Further, according to Article XVI.1 of the WTO Agreement, decisions, procedures and customary practice followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947 should be followed in the WTO era.³²⁵

³²⁵ Marrakesh Agreement establishing the World Trade Organisation (15 April 1994) L7/UR/A/2 art 16.1.

The rule of recognition for WTO law can be enumerated thus: a proposition will be a valid legal proposition of the WTO regime, if it is a legal proposition of the WTO Agreement. Special and differential treatment provisions are found in the WTO agreements, rather than in for example, a declaration, or a mechanism like the more recent Aid for Trade. As such they satisfy the element of the rule of recognition which requires that the proposition must be contained in the WTO agreement. The second issue is whether special and differential treatment provisions are "legal propositions". Here we must quickly add that to simply locate a proposition in the WTO Agreement and conclude that it satisfies the rule of recognition, tells us very little. We must look to the interpretation of the provision in order to gain a more complete understanding of its legal standing. I therefore turn here to how the panels and appellate body have interpreted the questions of whether there is an obligation on developed countries *vis-à-vis* development, whether developing countries have a right *vis-à-vis* development, and as to the meaning of development.

With regard to the meaning of development, little discussion of this can be found in the panel and appellate body reports. With regard to the meaning of sustainable development, in the *US-Shrimp*³²⁵ case, the appellate body noted that the preamble "... attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* — which informs not only the GATT 1994, but also the other covered agreements — explicitly acknowledges 'the objective of sustainable development ...' The Appellate body

³²⁵ *United States — Import of Certain Shrimp and Shrimp Products* (6 November 1998) WT/DS58/R as modified by the Appellate Body Report WT/DS58/AB/R.

therefore saw sustainable development as an "objective" (this can be contrasted with the view that it is not only an objective, but a norm of customary international law). The Appellate Body on *US — Shrimp* further stated: "At the end of the Uruguay Round, negotiators fashioned an appropriate preamble for the new WTO Agreement, which strengthened the multilateral trading system by establishing an international organisation, *inter alia*, to facilitate the implementation, administration and operation, and to further the objectives, of that Agreement and the other agreements resulting from that Round. In recognition of the importance of continuity with the previous GATT system, negotiators used the preamble of the GATT 1947 as the template for the preamble of the new WTO Agreement. Those negotiators evidently believed, however, that the objective of 'full use of the resources of the world' set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990's. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words:.... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...."

In some instances the Panel has refrained from ruling on the issue of the nature of special and differential treatment provisions. In *United Kingdom-Dollar Area Quotas*,³²⁷ the United States brought a complaint regarding the imposition of quantitative restrictions by the United Kingdom on certain products including grapefruit and orange juice. The original purpose of the restrictions was for balance of payments reasons. However, the restrictions were maintained on grounds that they afforded valuable

³²⁷ *United Kingdom - Dollar Area Quotas* (adopted on 30 July 1973) BISD 20S/230, 231.

protection for the economic interests of the developing Commonwealth Caribbean countries. The Caribbean countries supported these measures arguing that "the restrictions must be viewed in the context of the General Agreement as a whole and with particular regard to Part IV of the Agreement...application of the quotas was justified in the light of Part IV which was designed to deal with the special circumstances of developing countries." The Panel refrained from ruling on the complaint and advised that the parties seek a mutually acceptable solution to the problem which would take into account the Caribbean countries and territories. No comment was made of whether the measures in question could be justified under Part IV of GATT.

One issue on which the panels and the appellate body have been clear is on the issue of whether there is a legally binding obligation to give preferences. The first criterion of identifying the obligor and the obligee is in general met. In *US-Steel Plate*³²⁸ the issue of who were the obligees arose. The Panel in *US-Steel Plate* addressed the question of "when and to whom special regard should be given" under Article 15 of the Anti-Dumping Agreement.³²⁹ The Panel concluded that Article 15 only requires special regard in respect of the final decision whether to apply a final measure and that such a special regard is to be given to the situation of developing country Members, and not to the situation of companies operating in developing countries:

"India's arguments as to when and to whom this 'special regard' must be given disregard the text of Article 15 itself.... Finally, India's argument focuses on the

³²⁸ *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* (28 June 2002) WT/DS206/R.

³²⁹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) (15 April 1994) LT/UR/A-1A/3 art 15.

exporter, arguing that special regard must be given in considering aspects of the investigation relevant to developing country exporters involved in the case. However, Article 15 requires that special regard must be given 'to the special situation of developing country Members'. We do not read this as referring to the situation of companies operating in developing countries. Simply because a company is operating in a developing country does not mean that it somehow shares the 'special situation' of the developing country Member."

However, identifying the obligation is more problematic and usually difficult to pinpoint as the language stipulating the obligation can be vague and ambiguous. Article 15 of the Anti-Dumping Agreement recognises that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Further that possibilities of constructive remedies provided for by the Anti-dumping Agreement "shall" be explored before applying anti-dumping duties where they would affect the essential interests of developing countries. The first part of Article 15 can be seen as "a best-endeavour clause". It lacks clarity in stipulating the specific actions to be taken. The second part is slightly less ambiguous. However, the mandatory "shall" is nullified by non-mandatory words, "would", "possibilities", "exploring". In *US — Steel Plate*,³³⁰ the Panel considered that there are no specific legal requirements for specific action in the first sentence of Article 15 and that, therefore, "Members cannot be expected to comply with an obligation whose parameters are entirely undefined".³³¹ According to the Panel, "the first sentence of Article 15 imposes no specific or general

³³⁰ *United States — Anti-Dumping and Countervailing Measures on Steel Plate from India* (28 June 2002) WT/DS206/R.
³³¹ *Ibid* paragraph 7.110.

obligation on Members to undertake any particular action.”³³² A similar view was expressed by the Panel on *EC — Tube or Pipe Fittings*³³³ as follows: “We agree with Brazil that there is no requirement for any specific outcome set out in the first sentence of Article 15. We are furthermore of the view that, even assuming that the first sentence of Article 15 imposes a general obligation on Members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action. The second sentence serves to provide operational indications as to the nature of the specific action required. Fulfilment of the obligations in the second sentence of Article 15 would therefore necessarily, in our view, constitute fulfilment of any general obligation that might arguably be contained in the first sentence. We do not see this as a ‘reduction’ of the first sentence into the second sentence, as suggested to us by Brazil. Rather the second sentence articulates certain operational modalities of the first sentence.”³³⁴ The Panel on *EC — Bed Linen*, in interpreting the term “explore”, in the second sentence of Article 15 stated that, while the concept of “explore” does not imply any particular outcome, the developed country authorities must actively undertake the exploration of possibilities with a willingness to reach a positive outcome. The Panel stated that:

“In our view, *while the exact parameters of the term are difficult to establish*, the concept of ‘explore’ clearly does not imply any particular outcome. We recall that Article 15 does not require that ‘constructive remedies’ must be explored, but rather that the ‘possibilities’ of such remedies must be explored, which further suggests that the

³³² *Ibid.*

³³³ *European Communities — Anti-Dumping Duties on Malleable Cast Iron or Pipe Fittings from Brazil* (18 August 2003) WT/DS219/R.

³³⁴ *European Communities — Anti-Dumping Duties on Malleable Cast Iron or Pipe Fittings from Brazil* (18 August 2003) WT/DS219/R as modified by the Appellate Body Report WT/DS219/AB/R paragraph 7.68.

exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the 'exploration' of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.³³⁵ The Panel on *EC — Bed Linen* concluded that "[p]ure passivity is not sufficient, in our view, to satisfy the obligation to 'explore' possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned."³³⁶ The Panel consequently regarded the failure of a Member to respond in some fashion other than bare rejection "*particularly once the desire to offer undertakings had been communicated to it*" as a failure to explore constructive remedies.³³⁷ In *US — Steel Plate*, India had argued that the United States authorities should have considered applying a lesser duty in this case, despite the fact that US law does not provide for application of a lesser duty in any case. The Panel, in a decision not reviewed by the Appellate Body, noted that "consideration and application of a lesser duty is deemed desirable by Article 9.1 of the [Anti-Dumping] Agreement, but is *not* mandatory."³³⁸ Therefore, it stated, a Member is not obligated to have the possibility of a lesser duty in its domestic legislation. The Panel concluded that

³³⁵ *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (12 March 2001) WT/DS141/R paragraph 6.233.

³³⁶ *Ibid* paragraph 6.238.

³³⁷ *Ibid* paragraph 6.238.

³³⁸ *United States — Anti-Dumping and Countervailing Measures on Steel Plate from India* (28 June 2002) WT/DS206/R paragraph 7.116.

"the second sentence of Article 15 [cannot] be understood to require a Member to consider an action that is not required by the WTO Agreement and is not provided for under its own municipal law."³³⁹

in *Norway-Restrictions on Imports of Certain Textile Products*³⁴⁰ Hong Kong brought a complaint against Norway's imposition of quantitative restrictions on certain textile products. Norway argued *inter alia* that the preferences it had given to the developing countries in that context were in conformity with the spirit and objectives of Part IV. The Panel rejecting Norway's argument noted that "provision for some developing exporting countries of assured increase in access to Norway's textile and clothing markets might be consistent for those countries with the spirit and objectives of Part IV of the GATT, this cannot be cited as justification for actions which would be inconsistent with a country's obligations under Part II of the GATT."³⁴¹ This ruling supports the argument that in the context of GATT Part IV, there are no substantive obligations to which recourse can be had, by a developed country to justify derogation of other GATT obligations. The key point here is that the panel was unable to find an obligation on developed countries, owed to developing countries. In *European Economic Community-Restrictions on Imports of Dessert Apple*,³⁴² the panel commented on the obligation of developed countries, owed to developing countries under Part IV of GATT 1994, however, their comments were only *obiter dicta*. In *European Economic Community-Restrictions on Imports of Dessert Apple* Chile had argued, *inter alia*, that the European Community was in contravention of provisions of Articles XXXVI and

³³⁹ *Ibid.*

³⁴⁰ *Norway-Restrictions on Imports of Certain Textile Products*, 25 July 1979, L4959, BISD 27S/119.

³⁴¹ *Ibid.* paragraph 15.

³⁴² *European Economic Community – Restrictions on Imports of Dessert Apples-Complaint by Chile* (22 June 1989) GATT Panel Report BISD 36S/93 452.

XXXVII of Part IV of GATT 1994, in particular Article XXXVII:1(b) which states that "the developed contracting parties shall to the fullest extent possible...refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less developed contracting parties." And Article XXXVII:3(c) by which developed contracting parties are required to "have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect the essential interests of those contracting parties." The Panel found that the import measures of the European Economic Community (EEC) on dessert apples had negatively affected the export interests of Chile. The Panel said that although the EEC had held consultations with affected suppliers and had amended its regulations, "these consultations and amendments had been general in scope and had not related specifically to the interests of less-developed contracting parties in terms of Part IV."³⁴³ The Panel added that there was no evidence to indicate that the EEC had made "appropriate efforts to avoid taking protective measures on apples originating in Chile" and that the obligations in Part IV were additional to those under Parts I to III of GATT.³⁴⁴ The Panel however, did not explicitly state whether the EEC was in breach of its obligations under Part I: the Panel noted that the commitments entered into by contracting parties under Article XXXVII were additional to their obligations under Parts I-III of the General Agreement, and that these commitments therefore applied to measures which were permitted under Parts I-III. As the Panel had found the EEC's import restrictions to be inconsistent with specific obligations of the EEC under Part II of the General Agreement, it did not consider it

³⁴³ *ibid* p. 452 paragraph 12.32.

³⁴⁴ *ibid*.

necessary to pursue the matter further under Article XXXVII.

The Panels and Appellate body have interpreted those provisions that require developed countries to take into account the special situation of developing countries before imposing any measures that might affect their trade interests, as either giving rise to legally enforceable obligations in some instances, or as not giving rise to legally enforceable obligations in other instances. An example of the former instance is the *Line Pipe* case noted above. An example of the latter case is *European Communities- Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India* regarding Article 15 of the Anti-Dumping Agreement.³⁴⁵ Article 15 of the Anti-Dumping Agreement provides that: it is recognised that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping duties. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.³⁴⁶ The Panel held that Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. The Panel did hold however, that Article 15 does impose an obligation to actively consider, "with an open mind", the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.³⁴⁷ A similar conclusion was reached in *EC-Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* (GATT case) regarding

³⁴⁵ *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (12 March 2001) WT/DS141/R as modified by the Appellate Body Report WT/DS141/AB/R.

³⁴⁶ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (15 April 1994) L.T./UR/A-1A/3, art 15.

³⁴⁷ *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (12 March 2001) WT/DS141/R as modified by the Appellate Body Report WT/DS141/AB/R, paragraph 6.253.

Article 13 of the Tokyo Round Anti-Dumping Code.³⁴³ The Panel held that the first sentence of Article 13 of the Tokyo Round Anti-Dumping Code did not create any positive obligations on developed countries, whilst the second sentence only imposed a conditional obligation on them. The Panel held the view that Article 13 should be interpreted as a whole. It found that even assuming for argument's sake that an obligation was imposed by the first sentence, its wording contained no operative language delineating the extent of the obligation. Such language was only found in the second sentence of Article 13. It was clear from the words "possibilities" and "explored" that the investigating authorities were not required to adopt constructive remedies merely because they were proposed. The Panel found that the EC had not breached its obligations under this Article, as it had "considered whether it could enter a quantitative undertaking and had considered that such an undertaking would not eliminate the injury caused by the dumped imports."

In some instances the obligation is repetitive of already existing treaty obligations without creating any new obligations owed to developing countries per se. The Panel on EC — *Bananas III* addressed the issue of whether Article 1.2 of the Agreement on Import Licensing Procedures in itself creates obligations additional to those arising from GATT.³⁴⁴ The Panel considered the historical developments of the GATT/WTO rules on licensing and concluded that, except for a reference to *developing Members*, Article 1.2 "... derives from the 1979 Tokyo Round Agreement on Import Licensing Procedures which was negotiated as a self-standing agreement without a formal legal link to GATT 1947. Accordingly, membership was open not only to GATT contracting

³⁴³ *European Economic Community — Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* (30 October 1995) GATT Panel Report BISD 42S/17 521.

³⁴⁴ Agreement on Import Licensing Procedures (15 April 1994) LTIUR/A-1A/5.

parties and the European Communities, but also to any other government. Therefore, provisions of GATT 1947 applied between the signatories of the 1979 Licensing Agreement, by virtue of that agreement, only to the extent that they had been explicitly referred to and incorporated into the 1979 Licensing Agreement. In this context, Articles 1.10 and 4.2 of the 1979 Licensing Agreement mention, *inter alia*, Articles XXI, XXII and XXIII of GATT 1947. Accordingly, the general rule that administrative procedures used to implement import licensing regimes had to conform with the relevant GATT provisions in fact added only to the obligations which any non-GATT contracting parties among the signatories of the 1979 Licensing Agreement would have been subject to. The wording of Article 1.2 remained unchanged in the Uruguay Round. Given that the Agreement Establishing the WTO and all the agreements listed in Annexes 1 through 3 thereto constitute a single undertaking, however, Article 1.2 of the WTO Licensing Agreement has become largely duplicative of the obligations already provided for in GATT, except for the reference to developing country Members. Given this context, Article 1.2 of the WTO Licensing Agreement has lost most of its legal significance." It must be noted that despite its finding that Article 1.2 of the Licensing Agreement merely duplicates already existing obligations, the Panel recalled the principle of effective treaty interpretation: "However, the Appellate Body has endorsed the principle of effective treaty interpretation by stating that 'an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'. In light of this, we have to give effect and meaning to Article 1.2 of the Licensing Agreement. For this reason, to the extent that we find that specific aspects of the EC licensing procedures are not in conformity with Articles I, III or X of GATT, we necessarily also find an inconsistency with the requirements of Article 1.2 of the Licensing Agreement." The Panel on *EC-Bananas III* also addressed the legal significance of the reference in Article 1.2 to developing country Members: "With

respect to Article 1.2's requirement that account should be taken of 'economic development purposes and financial and trade needs of developing country Members', the Licensing Agreement does not give guidance as to how that obligation should be applied in specific cases. We believe that this provision could be interpreted as a recognition of the difficulties that might arise for developing country Members, in imposing licensing procedures, to comply fully with the provisions of GATT and the Licensing Agreement. In the alternative, *Article 1.2 could also be read to authorize, but not to require, developed country Members to apply preferential licensing procedures to imports from developing country Members.* In any event, even if we accept the latter interpretation, we have not been presented with evidence suggesting that, in its licensing procedures, there were factors that the EC should have but did not take into account under Article 1.2. Therefore, we do not make a finding on whether the EC failed to take into account the needs of developing countries in a manner inconsistent with the requirements of Article 1.2 of the Licensing Agreement.³⁵⁰

It is also clear, in some circumstances that the intention, as contained in the agreements, is precisely, not to create a legally binding commitment. The WTO adjudicatory bodies have affirmed instances when the intention to create legally binding obligations is absent with regard to special and differential treatment. In the WTO dispute *Brazil-Aircraft*, the appellate body found that the special and differential treatment in question was an 'exception', to the prohibition on export subsidies i.e. the appellate body found that Article 27.4 of the Agreement on Subsidies and Countervailing Measures provides a limited and conditional exception to the prohibition

³⁵⁰ Panel Report, *EC-Bananas III*, paragraphs 7.272-7.273, www.wto.org (accessed 2 September 2014).

on export subsidies.³⁵¹ In *EC-Tariff Preferences* the appellate body held that the Enabling Clause did not require preference-giving countries to give identical tariff preferences to all developing countries.³⁵² The Enabling Clause permits countries to disregard their obligations under Article I of GATT 1994 to give preferences to developing countries. However, the language of the Enabling Clause does not make this giving of tariff preferences mandatory. The decision whether or not to give tariff preferences is left entirely in the hands of the preference-giving country. Indeed, this was the finding in *EC-Tariff Preferences*. According to *EC-Tariff Preferences*, the Enabling Clause does create an obligation on the preference-giving country, to provide identical tariff preferences, to similarly situated developing countries. This means that once a tariff preference has been given, the preference-giving country is under an obligation to give the preference to all similarly situated GSP beneficiaries, i.e. to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond. The determination of whether developing countries are similarly situated must be based on objective criteria. Once the preferences are granted, they must be granted on a non-discriminatory basis and in accordance with the Enabling Clause. (Thus, WTO members can distinguish between recipients of preferences between developing countries, provided that they established objective criteria to this effect. What is unclear however, is what is to serve as benchmarks to distinguish between acceptable or indeed, unacceptable criteria, upon which additional preferences could be legitimately granted. Further it is unclear whether the criteria should be unilaterally defined, or whether they should be the outcome of some consensus between donor and recipient countries.)

³⁵¹ *Brazil – Export Financing for Aircraft* (6 November 1998) WT/DS46/AB/R.

³⁵² *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (20 April 2004) WT/DS246/AB/R.

Rule of adjudication:

The 'rule of adjudication' is provided for in the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU).³⁵³ Particularly, in line with Hart's criteria the DSU stipulates who is to adjudicate, and defines the procedures to be followed. Built on the pre-existing GATT system, Article XVI:1 of the WTO Agreement provides that , "except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947." Article 2.1 of the DSU provides for the competent bodies to adjudicate WTO disputes:

"The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only

³⁵³ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1.

those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute"

Thus the Dispute Settlement Body, establishes panels, adopts panel and Appellate Body Reports, supervises the implementation of recommendations and rulings, and authorises sanctions for failure to comply with dispute settlement decisions.

The adjudication of disputes brought to the WTO is carried out at the first-instance, by dispute settlement panels. This continues the panel system of the GATT 1947. Article 8 of the DSU provides for the composition of Panels. Panels are composed of three (exceptionally five) persons, well qualified governmental and/or non-governmental individuals, selected from a roster of persons suggested by WTO Members. Panel Members serve in their individual capacities and not as representatives of a government or any organisation. The Appellate Body reviews panel rulings. It is a standing institution composed of seven persons appointed by the Dispute Settlement Body for four-year terms. The members of the Appellate Body must be persons with demonstrated expertise in law and international trade, and the subject matter of the covered agreements generally, who are not affiliated with any government. Three Appellate Body members hear cases at any one time.

The dispute resolution procedure is such that the member with a grievance must first make a request for consultations with the other member or members. The member concerned must reply within 10 days and enter into good faith consultations within 30 days after receiving the request. The parties in a dispute may employ good offices, conciliation or mediation as a means of settlement. WTO Members can also agree to use binding arbitration as an alternative means of dispute settlement.

There are also specific special and differential treatment, "rules of adjudication" in the dispute settlement understanding. These provisions outline who is to adjudicate in a dispute involving a developing country member as well as the procedure to be followed:

With regard to the former, Article 3.2 of the DSU provides an alternative to the DSU altogether, during the consultation phase, in a dispute involving a developing country as complainant. Article 3.2 of the Dispute Settlement Understanding states:

"Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966, except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail." The 1966 decision titled Decision of 5 April 1966 on procedures under Article XXIII,³⁵⁴ permits a complaining developing country to use the Director-General as a facilitator when the defending party is a developed country. The Decision then instructs the disputing parties to cooperate with the Director General and permits him or her to consult the relevant organs and-upon a request from one of the disputing parties and two months after receiving the information from the disputing parties to present a report to the CONTRACTING PARTIES (now the DSB). The CONTRACTING PARTIES then establish an expert panel to examine the matter and recommend a solution. The panel

³⁵⁴ Decision of 5 April 1966 on procedures under Article XXIII BISD 14S/18.

has sixty days to prepare its report and must take into account the development aspect of the matter. If the developed country is found to be in breach of its obligation, it has ninety days to report to the CONTRACTING PARTIES on its actions to implement the recommendations. The CONTRACTING PARTIES can examine these actions and, if they have not fully implemented the recommendations, and the situation is serious, then the CONTRACTING PARTIES can permit the developing country to suspend its concessions *vis-à-vis* the other party. Any other appropriate course of action may also be decided. The 1966 Decision was successfully invoked by Columbia, in the *EC-Bananas* case.³⁵⁵ It must be noted that in 1966 the GATT's dispute settlement system did not follow a timetable. As decisions under GATT were made by consensus, any country could block the process. As such, the Decision introduced a timetable and made the process automatic and much shorter than the normal process. The DSU, on the other hand, has established a firm timetable, and defending parties can only block the first request for the establishment of a panel.

Article 8.10 of the DSU stipulates that when a dispute is between a developing country Member and a developed country Member the panel is to include at least one panelist from a developing country Member. This provision has in fact been used in almost all the disputes involving a developing country as an automatic action, even without the developing countries' request.

There are a number of provisions in the DSU that provide for the procedure to be followed when the dispute involves a developing country member. Article 12.10 provides that in the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in

³⁵⁵ Interview, ACWL-Geneva, 2012.

paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. Further, in examining a complaint against a developing country Member, the panel is to accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

Article 12.11 provides that where a party to a dispute is a developing country Member, the panel's report is to explicitly indicate the form in which account has been taken of relevant provisions on differential and more favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

Article 24.2 also provides for special procedures for disputes involving least developed countries. Article 24.2 provides that in dispute settlement cases involving a least developed country Member, where a satisfactory solution has not been found in the course of consultations, the Director General or the Chairman of the DSB are to, upon request by a least developed country Member, offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Article 27.2 provides for the Secretariat's assistance in disputes involving developing countries. Article 27.2 provides that whilst the Secretariat assists Members in respect of dispute settlement at their request, there may be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat is to make available a qualified legal expert from the WTO technical co-operation services to any developing country Member which so requests.

This expert is to assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

Rule of Change:

Article X of the WTO Agreement constitutes the 'rule of change' in the WTO legal regime.³⁵⁶ It provides for the amendment of the WTO Agreement, albeit, the WTO agreements are very difficult to amend. An amendment must be formally tabled for at least 90 days before being submitted for acceptance (Article X:1). The Ministerial Conference has exclusive competence to vote on amendments. Certain provisions of the agreements may only be amended by unanimous vote (Article X:2). Some provisions can be amended by two-thirds vote, but such an amendment is binding only on those Members accepting it (Article X:3 and Article X:4). The Ministerial Conference, by three-quarters vote, can decide that all Members must accept an amendment and recalcitrant Members either must withdraw from the WTO or remain a Member with the consent of the Ministerial Conference (Article X:5).

Another rule of change that can be inferred from WTO practice is that new primary rules of obligation can be introduced by decisions of the contracting parties. An example is the Decision on Measures in favour of Least-developed countries taken at the December 2005 Hong Kong ministerial. This decision introduced new primary rules of obligation on developed countries to provide duty-free and quota free market access on a lasting basis for all products originating from all LDCs (by 2008 or no later than the start of the Doha implementation period in a manner that ensures stability, security and

³⁵⁶ Marrakesh Agreement establishing the World Trade Organisation (15 April 1994) LTI/UR/AJ2 art. X.

predictability). Members facing difficulties to provide duty-free and quota-free market access are to provide duty-free and quota-free market access for at least 97 per cent of products originating from LDCs defined at the tariff line level. In addition, these Members are to take steps to progressively achieve compliance with these obligations taking into account the impact on other developing countries at similar levels of development, and, as appropriate, by incrementally building on the initial list of covered products.

Another rule of change is of course that effected by the WTO round of negotiations. Special and differential treatment for developing countries has evolved as when looks at the rounds of negotiations to date. Generally the shift has been from being excepted from GATT obligations to limited flexibility with regard to implementation.

6.4 Conclusion

To summarise, development law in the WTO follows Hart's conceptualisation of law as a union of primary and secondary rules. The primary rules identified are: developed countries have an obligation to provide duty-free and quota free market access to least developed countries; there are procedural rules with regard to developing countries as for example under article 9 of the Safeguards Agreement; there are rules allowing for exemption from WTO obligations as for example the enabling clause and article 27 of the Agreement on Subsidies and Countervailing Measures ; there are rules allowing developing countries lesser obligations as compared to developed countries as for example in the Agreement on Agriculture; there are rules allowing developing countries a longer time to implement obligations as for example article 65 of TRIPS. The secondary rules are as follows: The rule of recognition for WTO law can be enumerated

as a legal proposition of the WTO Agreement. Special and differential treatment provisions are found in the WTO agreements. As such they satisfy the element of the rule of recognition which requires that the proposition must be contained in the WTO agreements. Further WTO panels and the appellate body have considered, applied and interpreted special and differential treatment provisions and affirmed that these provisions are an integral part of the WTO agreement. The rule of adjudication can be seen in the procedure available under the DSU when a dispute involves a developing country member. The rule of change can be seen generally, in article X of the WTO Agreement which stipulates how new primary rules are to be introduced in the WTO.

One issue that needs to be addressed is whether WTO Law is an integral part of international law, or whether it is a self contained system with no relationship to international law. This is significant as this thesis argues that international development law is law, particularly, that it is international law. Traditionally, international trade law (much perhaps, like international development law) was seen as outside the purview of international law whose main focus was peace and security in terms of territorial integrity and political independence of states in terms of sovereignty. International trade law was often treated under the rubric of international economic relations. Contemporary international law however, does recognise international trade law, of which WTO law is central. This acceptance of international trade law as an integral part of international law is reflected in the WTO's own jurisprudence. According to Article 3.2 of the Dispute Settlement Understanding, panels and the Appellate Body must interpret the WTO agreements according to 'customary rules of interpretation of public international law'. In *US- Shrimp* the Appellate body made use of principles in other international agreements (such as the United Nations Convention on the Law of the Sea 1982, the Convention on Biological Diversity 1992) even though not all the parties

to that dispute were parties to these agreements. WTO law is an integral part of contemporary international law and an important area of hard development law.

Aspirational, declaratory and hard development law can be seen as linked to and emerging from a broader 'legal process'. It is to legal process that I now turn in the next chapter.

CHAPTER 7:

LAW AS PROCESS

7.1 Introduction

The aim of this chapter is to illustrate that international development law conforms to international law as understood by the criteria of legal process. In theoretical terms, legal process identifies international law as a continuing process of authoritative decision by which members of the international community identify, clarify and secure the common interest in response to the expectations of all participants.³⁵⁷ 'Participants' refers to all those who act or participate in roles of varying significance in the process that culminates in the decision. To be legally valid the participants must be represented by all those who can make claims or be subjected to claims on the basis of the decision. Chief parts of the process as identified in the literature include: participants; arenas of authority; and decision outcomes.³⁵⁸ I will illustrate the participants, decision outcomes and arenas of authority with particular reference to sustainable development.

The chapter is divided into three main sections: Participants; Decision Outcomes; and Adjudicatory Arenas of Authority.

7.2 Participants

In legal process, participants are those who are expected to make law, in arenas in

³⁵⁷ L.Chen, *An Introduction To Contemporary International Law-A Policy-Oriented Perspective*, 2nd edn., New Haven, Yale University Press, 2000, p. ix. This view of law originated with the American school of 'legal realism' and is associated with the work of the Yale school of international law, particularly that of Myres S. McDougal. M.S. McDougal et al., *Studies in World Public Order*, Yale University Press, 1960, ch. 1. See also R.Higgins, 'Policy Considerations and the International Judicial Process', *International and Comparative Law Quarterly*, vol.17, 1968.

which they are expected to make it.

Arguably, the most important role in the process of elaborating sustainable development was that played by United Nations Conference on Environment and Development (UNCED) in 1992. Rio, for short. This conference produced principles designed to commit governments to ensure environmental protection and responsible development, defining the rights of people to development, and their responsibilities to safeguard the common environment. Rio advocated that the only way to have long-term social and economic progress was to link it with environmental protection and to establish equitable global partnerships between governments and key actors of civil society and the business sector.

The United Nations Conference on Environment and Development 1992, is a good illustration of participants involved in development law.³⁵⁹

The major participants are States. At Rio, nation state participants could be divided into two groups. There were the developed states known as the Group of Seven (G-7) and the developing states known as the Group of Seventy-Seven (G-77).³⁶⁰ The number of states who participated in the process was over 170 with the majority at the level of heads of State or government.³⁶¹

Other participants are international governmental organisations (IGOs). At Rio the

³⁵⁹ Ibid.

³⁶⁰ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I).

³⁶¹ J. Batt and D.C. Short, 'The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science, and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development', *Journal of Natural Resources & Environment Law*, vol.8, 1992-1993, p. 240.

³⁶² <http://www.un.org/geninfo/bp/enviro.html> (Accessed 20 August 2014).

principal international governmental organisation was the United Nations. The United Nations was instrumental in the planning and organising of the conference. There are also important bodies such as the UN Commission on Sustainable Development and the United Nations Environment Programme.

Nongovernmental organisations (NGOs) and associations are also key participants. NGOs and associations, particularly those whose mandate includes development, are expected to have something to say about development. About 2,400 representatives of NGOs were represented at Rio 1992.³⁶² At Rio, NGOs exerted political pressure by lobbying state delegates including preparing reports and submitting them to the delegates. About 17,000 people, including indigenous groups, participated in the Global Forum which was a parallel conference held simultaneously with Rio.³⁶³ The aim of the Global Forum was to create world wide awareness of the need to link economic development to environmental protection.³⁶⁴ Other participants, categorised into representative groups include Local Authorities, Workers and Trade Unions, Business and Industry, Scientific and Technological Communities, Women, Children and Youth, indigenous People, Farmers.³⁶⁵

The important point in all this, is that Rio represented consensus on a global scale, and thus authoritative in this regard. There are many participants, but the central point from a legal process stand point is that those who make law are those who are expected to

³⁶² <http://www.un.org/geninfo/bp/enviro.html> (Accessed 20 August 2014).

³⁶³ *Ibid.*

³⁶⁴ J. Batt and D.C. Short. 'The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science, and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development', *Journal of Natural Resources & Environment Law*, vol.8, 1992-1993, p. 240.

³⁶⁵ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I) particularly Agenda 21 on "Strengthening the Role of Major

make it.

A high regard is also given to lawyers as participants in the legal process.³⁶⁶ The role of international law in achieving sustainable development has been a theme in intergovernmental discussions on sustainable development. The work of the International Law Association (ILA), for example, has been significant in establishing the necessary legal framework. The International Law Association's New Delhi Declaration³⁶⁷ is an important text in elaborating the legal principles of sustainable development.

Individuals are also very important participants in the legal process. Legal process recognises that individuals are the ultimate actors in all social processes including the legal process.³⁶⁸ Individuals communicate and collaborate throughout the process of authoritative decision as well as in the shaping and sharing of values.³⁶⁹ Individuals fulfill this role via various groups and institutional forms and also by acting in their own right.³⁷⁰ A notable individual in the Rio process was Maurice Strong who was the UNCED Secretary General. In the developed states, Strong promoted shifting resources from national defence, to projects that would promote sustainable development.³⁷¹ In the developing states, Strong set out to convince leaders that

Groups".

³⁶⁶ H. Bull, *The Anarchical Society-A Study of Order in World Politics*, 3rd edn., Basingstoke and New York, Palgrave, 2002, p.123.

³⁶⁷ International Law Association 'ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development' *International Environmental Agreements: Politics, Law, and Economics* 2, no. 2 (2002): 211-216.

³⁶⁸ L.Chen, *An Introduction To Contemporary International Law-A Policy-Oriented Perspective*, 2nd edn., New Haven, Yale University Press, 2000, p. 75.

³⁶⁹ *ibid.*

³⁷⁰ *ibid.*

³⁷¹ J.Batt and D.C. Short, 'The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science, and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development', *Journal of Natural Resources & Environment*

development without environmental protections would, in the long run be detrimental to economic and social development.³⁷² His message to both developed and developing states was that destroying the environment would lead to a worldwide systemic breakdown.³⁷³

7.3 Decision Outcomes

The appraising function is evident in one of the outcomes of Rio, called Agenda 21, in setting out the policy objectives of the international community.³⁷⁴ Agenda 21 specifies in substantial detail the relevant goals related to economic development and environmental protection. The fundamental goals in summary are: (1) Promotion of relative economic equality by acting collectively and individually (at the nation-state level) to reduce and eradicate global poverty. (2) Protection of world resources (global and regional) including water resources (oceans, seas, marine life forms, etc.), the atmosphere and land masses (3) The upgrading of the quality of life through such actions as providing an appropriate water supply for all populations, effectively managing waste materials, and reversing the curve of urban area pollution. (4) The control of hazardous materials such as nuclear waste and chemicals. (5) The development of policies and programs directed at efficient resource utilisation. Resources contemplated in the goal of enacting policies and programs directed at efficient resource utilisation include energy-producing materials, forests, land resources (as for agriculture), fragile ecological systems, biodiversity life forms.

Law, vol.8, 1992-1993, p.236.

³⁷² *ibid* p. 237.

³⁷³ *ibid*.

³⁷⁴ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992)

Agenda 21 also had an important institutional product-the establishment of the Commission for Sustainable Development. The Commission for Sustainable Development facilitates carrying out the collective goals enshrined in Agenda 21. The Commission is modeled on the United Nations Commission on Human Rights. The Commission monitors States' compliance with Agenda 21, the United Nations Framework Convention on Climate Change,³⁷⁵ and the Convention on Biological Diversity³⁷⁶. In addition, it operates to identify gaps in the scope of coverage of Agenda 21. The Commission for Sustainable Development is an intergovernmental institution. It is empowered to receive complaints from nongovernmental organisations as well as from States. However, similar to the Commission on Human Rights, the Commission for Sustainable Development does not have the power to impose traditional sanctions. It was envisaged that the Commission would use its standing and the threat of exposure, to motivate States to comply with the policies and programmes developed at Rio.

Rio resulted in important international agreements, a strategy by which States chose to commit themselves to particular goals. There is the United Nations Framework Convention on Climate Change (UNFCCC).³⁷⁷ This convention stresses the significance of the concern for the ever-increasing atmospheric concentration of gases which collectively have come to be known as greenhouse gases. These gases are those that produce the well documented greenhouse effect. The greenhouse effect is viewed as a global hazard as it produces temperature increases in the atmosphere and

UN Doc A/CONF. 151/26 (vol. I).

³⁷⁵ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

³⁷⁶ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1750 UNTS 79.

³⁷⁷ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered

at the earth's surface. Such temperature increases are believed to have negative effects on ecosystems and consequent adverse impact on the quality of human life. Parties to the Climate Change Convention agreed to act to reduce and prevent, in so far as is realistic, the emission of these gases. In addition, the parties agreed to collect relevant data and make such data available to the conference of parties created by the Convention. In order to achieve the emission control goal, States agreed to cooperate to develop the scientific capacity to effectively control these emissions. Under the Convention, provision is made for the financing of international collaborative efforts. Further, disputes in regard to the Convention are to be settled via measures such as negotiation, conciliation, and arbitration.

There is also the Convention on Biological Diversity.³⁷⁸ Under this Convention, the contracting parties recognise that the preservation of biological diversity is important to the protection of the biosphere. The Convention affirms that States have the primary responsibility for the preservation of biological diversity existing within their jurisdiction. Parties to the Convention on Biological Diversity agreed to use source management techniques and, when appropriate, establish protected areas. Parties also agreed to facilitate the transfer of relevant technology. Contracting parties agreed to provide those developing countries which provide genetic materials for research with an opportunity to benefit from biotechnological activities. Developed countries, agreed to aid developing countries in achieving convention objectives by providing financial support.

A third important Rio document is the Statement of Principles for a Global Consensus of the Management, Conservation, and Sustainable Development of all types of

into force 21 March 1994) 1771 UNTS 107.

³⁷⁸ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

forests.³⁷⁹ This document expressly recognises the fundamental function of forests in sustaining planetary life. Forests are to be dealt with in a manner which is productive of renewable bio-energy sources, but which takes into account those factors critical in promoting the project of sustainable development. National policy and legislation are to incorporate these factors.

The promotion function can be seen in a number of principles of the Rio Declaration. Principle 3 advocated for the right to development to be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. Principle 6 advocated for the addressing and priority of the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable. However, Principle 6 added that international actions in the field of environment and development needed also to address the interests and needs of all countries.

Principle 7 advocated for "common but differentiated responsibilities" i.e. in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledged the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

The Rio declaration also advocated for effective participation in environmental and development processes. For example Principle 22 includes indigenous people and their

³⁷⁹ Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992): Non-Legally Binding Authoritative Statement of Principles For A Global Consensus On The Management, Conservation, And Sustainable Development of All Types of Forests. A/CONF.151/26 (Vol.III).

communities and other local communities as having a vital role in environmental management and development because of their knowledge and traditional practices. States are to recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Another example of this participatory principle is Principle 10 which stipulates that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual is to have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States are to facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, is also to be provided. The latter demand for judicial and administrative proceedings points to the 'application function'. However, this is confined to within the nation state rather than application at the international level. Notwithstanding, the Rio declaration advocated for environmental measures addressing transboundary or global environmental problems to be, as far as possible, based on an international consensus. The promotion function can also be seen in the Rio declaration's advocacy for the further development of international law in the area of environmental liability and compensation. According to Principle 13, states were to cooperate in an expeditious and more determined manner to develop further, international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

Prescribing Function:

Legal Meaning of Sustainable Development

In 1987, the United Nations released the Brundtland Report, which included what is now one of the most widely recognised definitions of sustainable development:

"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."³⁸⁰ The Brundtland Report elaborates on the meaning of sustainable development along three key aspects. Firstly, sustainable development is a goal, and one not only for the developing countries, but also for the developed countries.³⁸¹ Secondly, sustainable development is not static, but rather, is a process of change, in which "the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are made consistent with future as well as present needs."³⁸² Thirdly, with regard to "needs", the report points to "basic needs" which it also describes as "essential needs" of particularly countries in which the majority are poor i.e. developing countries. Such equity, the report contends, would be supported by political systems that secure effective participation of citizens in decision making processes and by greater democracy in international decision making.³⁸³

Similarly, the Rio Declaration, gives the definition of sustainable development along the same lines of meeting the needs of present and future generations. Principle 3 of the Rio Declaration states: "the right to development must be fulfilled so as to equitably

³⁸⁰ Report of the World Commission on Environment and Development: Our Common Future, transmitted to the General Assembly as an Annex to document A/42/427.

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ *Ibid.*

meet developmental and environmental needs of present and future generations.³⁸⁴ Similar to the Brundtland report, principles 5 and 6 of the Rio declaration identify the eradication of poverty as well as the recognition of the needs of developing countries, as essential to the achievement of sustainable development.

Before the Rio declaration (1992), development was seen in mainly economic terms and largely did not include environmental considerations. A good example of pre-Rio reasoning was recounted in the Brundtland report. Development was seen as an increase in the gross income of a State i.e. as economic growth. The Brundtland report recognised that whilst economic growth had led to improvements in living standards particularly in the developed countries, the way in which this had been achieved, for example by use of increasing amounts of raw materials, energy, chemicals and synthetics, had led to environmental damage in the longer term.³⁸⁵ Poverty in developing countries was also identified as problematic as it had put pressures on resources and caused damage to the immediate environment in efforts for bare survival.³⁸⁶ Institutions and policies dealt with development and environmental concerns separately, with development seen as economic growth, not taking into account the costs of environmental destruction.³⁸⁷ The Brundtland report recognised that the process of economic growth, both in developed and developing countries, did not take account of the stock of resources or capital that sustains it.³⁸⁸ An example given by the report were forestry operations which were conventionally measured in terms of the value of timber and other products extracted, minus the costs of extraction. The costs

³⁸⁴ Report of the United Nations Conference on Environment and Development' (3-14 June 1992) UN Doc A/CONF.151/5/Rev.1, principle 3.

³⁸⁵ Report of the World Commission on Environment and Development: Our Common Future, transmitted to the General Assembly as an Annex to document A/42/427.

³⁸⁶ *ibid* p. 29.

³⁸⁷ *ibid* p. 36.

of regenerating the forest were not taken into account, unless money was actually spent on such work. The profits from logging thus rarely took full account of the losses in future revenue incurred through degradation of the forest.³⁸⁸ Other examples given by the report were the similarly incomplete enterprise or national accounts for air, water and soil resources.³⁸⁹

A study of the Brundtland Report, the Rio Declaration, Agenda 21, and all the debates and negotiations that took place while preparing to adopt those texts, is very helpful for the legal definition of sustainable development as well as giving an understanding of the problem sought to be solved. Scientists brought to the fore the problems of a warming globe, threats to the Earth's ozone layer and deserts consuming agricultural land.³⁹⁰ This problem of environmental degradation was first seen as mainly a problem of the developed nations and a side effect of industrial wealth but has also become a survival issue for the developing nations.³⁹¹ One of the main sources of environmental degradation is new technology, which although being a stimulus for economic growth and having the potential for slowing the rapid consumption of finite resources, also has the effect of new forms of pollution and the introduction of new variations of life forms with the potential to change evolutionary pathways.³⁹² At the same time, those industries that rely heavily on environmental resources and pollute most heavily are growing most rapidly in the developing world where there is a greater urgency for economic growth and less capacity to minimise the environmentally damaging

³⁸⁸ *Ibid* p. 48.

³⁸⁹ *Ibid*.

³⁹⁰ *Ibid*.

³⁹¹ *Ibid* p.6.

³⁹² *Ibid*.

³⁹³ *Ibid* p. 14.

effects.³⁵⁴ The Rio conference and the outcome Rio declaration and Agenda 21, reflect a re-thinking of economic development to address and halt the destruction of natural resources, particularly finite resources and pollution of the earth.³⁵⁵

Given the foregoing, sustainable development can be defined first from a strictly technical narrow standpoint and second, from a broader ethical standpoint. From a technical standpoint sustainable development is economic development that does not lead to or that minimises environmental degradation. Principle 4 of the Rio declaration is a good example of this technical standpoint in stating: "on the basis of the objective of achieving sustainable development, environmental protection shall form an inseparable part of the developmental process and cannot be dealt with separately therefrom". From an ethical standpoint sustainable development is as expressed in Principle 3 of the Rio Declaration incorporating the concepts of intra-generational and inter-generational equity.

A more recent and much broader definition of sustainable development can be found in the preamble to the International Law Association New Delhi Declaration.³⁵⁶ The New Delhi declaration states: 'the objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation

³⁵⁴ Ibid.

³⁵⁵ <http://www.un.org/geninfo/bp/enviro.html> (last accessed 14/06/2015).

³⁵⁶ International Law Association 'ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development' *International Environmental Agreements: Politics, Law,*

in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations'. As the ILA New Delhi Declaration also notes, 'sustainable development is a matter of common concern both to developing and industrialised countries'.

The 2002 Johannesburg Declaration on Sustainable Development reiterates the broad definition of sustainable development. Expressing the concept of intra-generational equity, the Johannesburg declaration states '[w]e risk the entrenchment of [...] global disparities and unless we act in a manner that fundamentally changes their lives, the poor of the world may lose confidence in their representatives and the democratic systems to which we remain committed, seeing their representatives as nothing more than sounding brass or tinkling cymbals'.³⁹⁷ The Plan of Implementation adopted in Johannesburg in 2002 presents, a new conceptualisation of sustainable development. It states, 'efforts will also promote the integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption, and protecting and managing the natural resource base of economic and social development are overarching objectives of, and essential requirements for, sustainable development'.³⁹⁸ The Johannesburg declaration demonstrates that the international community endorsed a broader conception of sustainable development than previously envisaged, by including social development as one of the fundamental 'pillars'.

and Economics 2, no. 2 (2002): 211-216.

³⁹⁷ Johannesburg Declaration on Sustainable Development, UN Doc. A/CONF.199/20 (2002) p. 3.

³⁹⁸ *Ibid* p. 8.

Whilst there was some recognition of the social aspect both in the Brundtland report and at Rio, the 1995 World Summit for Social Development in Copenhagen can be credited for the international community's recognition of the social pillar of sustainable development. As the international community noted at Copenhagen in 1995, the interrelated nature of sustainable development provides the 'framework for our efforts to achieve a higher quality of life for all people'.³⁹⁹

Social development in the context of the meaning of sustainable development has many facets. Two key additions to the sustainable development agenda since Rio, and which arguably fall more within the social than the economic or environment pillars, are the issues of human rights and good governance. For example, the Copenhagen declaration 1995, linked social development and human rights as contained in the various human rights instruments, in particular the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights, the Declaration on the Right to Development including the rights relating to education, food, shelter, employment, health and information, aimed at assisting people living in poverty.⁴⁰⁰ The Copenhagen declaration also linked social development and good governance in stating that transparent and accountable governance and administration were necessary 'foundations of social and people-centred sustainable development'.⁴⁰¹ In addition to the inclusion of human rights and good governance, there has been a greater prioritisation of poverty eradication and health, further shifting the focus of the sustainable development agenda. Good examples are the millennium development goals which not only include economic and environmental goals, but also goals for the

³⁹⁹ 'Report of the World Summit on Social Development' (6-12 March 1995) UN Doc A/CONF./165/9.

⁴⁰⁰ 'Report of the World Summit on Social Development' (6-12 March 1995) UN Doc A/CONF./165/9. commitment 1.

eradication of poverty and health goals including combating HIV/AIDS, malaria and other diseases, improving maternal health and reducing child mortality.⁴⁰² Social development thus includes the observance of all human rights, good governance, as well as poverty eradication and health goals.

Principles:

In the legal process understanding of law, what lawyers say is important. In this regard, what the International Law Association has said about sustainable development is instructive, particularly in the absence of a single statute on sustainable development law. The committee on international law on sustainable development of the International Law Association was established to study the legal status and legal implementation of sustainable development. The mandate of the Committee includes: assessment of the legal status of principles and rules of international law in the field of sustainable development, with particular reference to the ILA New Delhi Principles of 2002,⁴⁰³ as well as assessment of the practice of States and international organisations in this field; the study of developing States in a changing global order, particularly the impact of globalisation on the sustainable development opportunities of developing countries; in the light of the principle of integration and interrelationship, a re-examination of certain topics of the international law of development, including analysis of (i) the position of the least developed countries in international law, (ii) the right to development and (iii) the obligation to co-operate on matters of social and environmental concern.

⁴⁰¹ Ibid preamble.

⁴⁰² United Nations Millennium Declaration A/RES/55/2.

⁴⁰³ International Law Association 'ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development' *International Environmental Agreements: Politics, Law,*

The ILA New Delhi Declaration is based on seven core principles of sustainable development law.⁴³⁴

- 1) The duty of States to ensure sustainable use of natural resources;
- 2) The principle of equity and the eradication of poverty;
- 3) The principle of common but differentiated responsibilities;
- 4) The principle of the precautionary approach to human health, natural resources and ecosystems;
- 5) The principle of participation and access to information and justice;
- 6) The principle of good governance; and
- 7) The principle of integration and interrelationship, in particular in relation to human

rights and social, economic and environmental objectives.

The ILA has provided ten guiding statements to support the continued application and development of these 7 principles.⁴³⁵ The Sofia Guiding Statements reflect how the New Delhi principles have been applied in judicial tribunals and how judicial tribunals can more effectively incorporate sustainable development in their decisions.⁴³⁶ First,

and Economics 2, no. 2 (2002); also published in UN Doc.AV57/329.

⁴³⁴ *Ibid.*

⁴³⁵ Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2012. Resolution No. 7/2012, annex.

⁴³⁶ ILA Report (2010) 816.

recourse to the concept of 'sustainable development' in international case law may, over time, reflect a maturing of the concept into a principle of international law, despite a continued and genuine reluctance to formalise a distinctive legal status; second, treaties and rules of customary international law should be interpreted in the light of principles of sustainable development-further, interpretations which might seem to undermine the goal of sustainable development should only take precedence where to do otherwise would undermine fundamental aspects of the global legal order, infringe the express wording of a treaty or breach a rule of *jus cogens*; third, as a matter of common concern, the sustainable use of all natural resources represents an emerging rule of general customary international law, with particular normative precision identifiable with respect to shared and common natural resources; fourth, the principle of equity (incorporating notions of intergenerational equity, intragenerational equity and substantive equality) and the goal of the eradication of poverty should, where appropriate, contextualise and inform judicial and quasi-judicial decision-making when matters of sustainable development are raised. To elaborate, although judicial bodies and quasi-judicial bodies cannot alone address the social, economic, governance and political issues that invariably form key aspects of such disputes, it is nevertheless incumbent upon judicial and quasi-judicial bodies to further such principles of equity and fairness in exercising their judicial function; fifth, the principle of common but differentiated responsibilities has a recognised status in treaty law, case law and State practice. Further reliance upon it by judicial bodies would strengthen this normative feature of sustainable development, thus allowing the legal principle to consolidate and be legally embedded as distinctive from the political discourse in which it is most often and currently utilised; Sixth, the precautionary principle has significant and increasingly precise legal implications, notwithstanding ongoing debate surrounding its formal legal

status; seventh, the principles of public participation and access to information and justice are foundational to sustainable development, and judicial and quasi-judicial bodies must seek to affirm this in their substantive decisions and, as applicable, as elements of their own procedure; eighth, although the principle of good governance has remained largely outside the jurisprudence of the International Court of Justice, elements of the principle can be seen in the existence and activities of judicial and quasi-judicial bodies. Therefore this principle should be endorsed more broadly; ninth, the principle of integration and inter-relationship is the primary means by which courts and tribunals provide an overarching conceptual framework for sustainable development. In support of the principle of integration and the expectations of standards of due process, integrative decision-making and good faith negotiations should be further strengthened; Lastly, environmental impact assessment is a mandatory rule of customary international law and must be recognised by judicial bodies, especially in matters affecting shared and common natural resources, and where there is a risk of transboundary and global environmental harm.

Of the ILA New Delhi Principles, principle 7 is particularly important i.e. the principle of integration and inter-relationship. Principle 7 states: '[t]he principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the needs of current and future generations of humankind'. The ILA has noted the importance of this principle to sustainable development as reflected by the support lent to it in a number of decisions of international tribunals.⁴⁰⁷ The 1970s saw a

⁴⁰⁷ Committee on International Law on Sustainable Development, 'International Law on Sustainable Development-First Report' in International Law Association Report of the Seventy First Conference (Berlin 2004) (International Law Association, London 2004). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1017>, Conference Report Berlin 2004 p 5

rise in environmental awareness with the notion of integrating environmental considerations into economic planning coming to the fore, both within domestic jurisdictions and internationally.⁴⁰⁸ At the international level, one of the first examples to elaborate on the principle of integration can be found in the Stockholm Declaration of 1972. Principle 13 of the Stockholm declaration states, 'States should adopt an *integrated and coordinated approach* to their development planning' and Principle 14 states 'Irrational planning constitutes an essential tool for *reconciling any conflict between* economic development and environmental protection. Similar wording can be found in almost all international instruments on the issue, that followed. Examples are the 1982 World Charter for Nature, the 1987 report of World Commission on Environment and Development, and in both Agenda 21 and the Rio declaration 1992. The ILA also notes that a number of binding treaties have also made provision for integrative decision making, both as a fundamental feature of the treaty regime itself and as an obligation for Parties to adopt domestically.⁴⁰⁹ Further, the Millennium Development Goals (MDGs) also seek to ensure a more integrated approach to their objectives.⁴¹⁰ The importance of the integration principle is reflected in international tribunal decisions and various international instruments, including treaties and recognised by the international law association.

The ILA has also elaborated on the meaning of the integration principle. According to the ILA, principle 4 of the 1992 Rio Declaration, provides the internationally agreed

(last accessed 19/06/2015).

⁴⁰⁸ Committee on International Law on Sustainable Development, 'International Law on Sustainable Development- Second Report' in International Law Association Report of the Seventy Second Conference (Toronto 2006) (International Law Association, London 2006). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1017>. Conference Report Toronto 2006 p 2 (last accessed 19/06/2015).

⁴⁰⁹ Ibid. Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1017> Conference Report Toronto 2006 p 3 (last accessed 19/06/2015).

reference-point on the issue of integration.⁴¹¹ Principle 4 of the Rio declaration states, 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. What is particularly noticeable about Principle 4, the ILA has noted is that much more so than Principle 1 of the Rio declaration 'human beings are at the centre of concerns for sustainable development...' or Principle 3 of the Rio declaration 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations', the language of Principle 4 'lends itself to legal interpretation and practical application'.⁴¹² Although many international instruments as seen above, consider integration as central to the achievement of sustainable development, it is less clear as to precisely what constitutes integration or, more specifically, the *range* of means by which integration can be achieved.⁴¹³ The wording of Principle 4 of the Rio Declaration suggests that it was never intended to be comprehensive. The reference to 'environmental protection shall constitute an integral part of the development process' the ILA notes, does not reflect the full scope of the uses to which integration is now put, albeit, being a useful shorthand of the concept.⁴¹⁴ The principle of integration is not a rigid concept but rather is given meaning dependent on the context.

The ILA has also stated general principles of international law that apply to sustainable

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ *Arbitration regarding the Iron Rhine Railway (Belgium / The Netherlands)* (2005) 'both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities' (paragraph 59).

⁴¹⁴ Committee on International Law on Sustainable Development, 'International Law on Sustainable Development- Second Report' in International Law Association Report of the Seventy Second Conference (Toronto 2006) (International Law Association, London 2006). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1017> Conference Report Toronto 2006 p 4 (last accessed 19/06/2015).

development. A first general principle is the *rule of law in international relations*, including *international economic relations*.⁴¹⁵ This entails a duty on States, on international institutions and other main actors in international economic relations such as the WTO to abstain from measures of economic policy that are incompatible with their international obligations and which are detrimental to the sustainable development opportunities of developing countries. Treaties and binding agreements by international institutions have to be observed and fulfilled in good faith by all parties concerned i.e. the principle of *pacta sunt servanda*, agreements must be kept.

Second, is the principle of the *duty to co-operate* towards sustainable development and protection of the environment. The duty to co-operate is well-established in international law and can be seen for example in two key international law instruments, Chapter IX on International Economic and Social Co-operation of the UN Charter⁴¹⁶ and Principle 4 of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations 1970.⁴¹⁷ The duty to co-operate towards sustainable development and protection of the environment is embodied in Principle 27 of the Rio Declaration, which states: 'States and peoples shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.' Rio Principle 7, similarly states, that 'States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem....'. The Preamble to the

⁴¹⁵ Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p 6 (last accessed 19/06/2015).

⁴¹⁶ Charter of the United Nations, 1 UNTS xiv: 58.

⁴¹⁷ UNGA Res 25/2625 (24 October 1970) UN Doc A/RES/25/2625. Principle 4 states in part :

"States have a duty to co-operate with one another, irrespective of the differences in their

Rio declaration makes reference to the goal of establishing a new and equitable global partnership through the creation of new levels of co-operation among States, key sectors and people. This principle is seen today, as no longer exclusively applying to States, but also applies to international institutions, civil society and the corporate world.⁴¹² Calling to observe principles in the areas of human rights, labour standards and the environment, it brings together companies with business organisations, UN organisations, international trade unions, non-governmental organisations and other parties to adopt partnerships and build a more inclusive and equitable global marketplace.⁴¹³

Third is the principle of the *observance of human rights*. This principle includes both economic, social and cultural rights as well as civil and political rights reflected by the two covenants enshrining these rights i.e. the International Covenant on Economic, Social and Cultural Rights 1966⁴²⁰ and the International Covenant on Civil and Political Rights 1966⁴²¹ respectively. Further, the preamble of the Vienna Declaration of the World Conference on Human Rights 1993 attests that both economic, social and cultural rights, and civil and political rights are included in human rights.⁴²² This principle is instrumental for integrating human rights concerns and sustainable development. Human beings are at the centre of both sustainable development and human rights

political, economic and social systems...”

⁴¹² Committee on Legal Aspects of Sustainable Development, ‘Legal Aspects of Sustainable Development-Fifth and Final Report’ in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p 7 (last accessed 19/06/2015).

⁴¹³ *ibid.*

⁴²⁰ International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, 5 ILM (1967) 360.

⁴²¹ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

⁴²² Vienna Declaration and Programme of Action (14-25 June 1993), UN Doc. A/CONF.157/24), Preamble, paragraph 8.

concerns, for example concerns for poverty alleviation can be seen in both human rights and the discourse on sustainable development. This principle is significant in that it emphasises the central role of public participation in promoting development, social progress and environmental conservation. Firstly, the fundamental human right to a life in dignity to which the right to development as the synthesis of existing human rights, such as the rights to an adequate living, food, education and primary health care, is closely related. Secondly, the principle includes participatory rights, access to information and justice.⁴²³

The fourth principle, and as noted above a central and important principle of sustainable development is that of *integration*. The principle of integration can be seen in various principles of the Stockholm declaration 1972, the Rio declaration 1992, the World Charter for Nature 1982, as well as from important multilateral treaties such as the UN Convention on the Law of the Sea 1982. Principle 3 of the Rio declaration states that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.⁴²⁴ Further, the Rio declaration integrates not only the concepts of environment and development, but also the needs of generations, both present and future (Rio Principle 4). Principle 13 of the Stockholm Declaration provides that 'States should adopt an integrated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their population'.⁴²⁵ Examples in treaty law, include the Law of the Sea Convention, which states: '... the

⁴²³ Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventeenth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p. 7 (last accessed 19/06/2016).

⁴²⁴ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 3.

⁴²⁵ 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5

problems of ocean space are closely interrelated and need to be considered as a whole'.⁴²⁶ Various international regimes are in the process of enhanced integration, as can be seen from the fourth Ministerial Conference of the WTO, held in Doha in 2001, to mainstream labour standards, environment and development in WTO arrangements.⁴²⁷

The ILA has further stated specific principles of international law that apply to sustainable development.⁴²⁸ A specific principle of international law in the field of sustainable development is the now established principle of *sovereignty over natural resources* according to which "each State has the right to possess and determine freely the management of its natural resources for its own development within the limits of international law".⁴²⁹ The meaning of this principle was the center of discussions in the context of the United Nations during the 1960s and 1970s as well as those of the former New International Economic Order (NIEO) Committee of the International Law Association.⁴³⁰ The principle of sovereignty over natural resources entails a duty on States to protect their environments as well as a corollary responsibility not to cause transboundary damage. One of the earliest documents to incorporate environmental responsibility in the principle of sovereignty over natural resources was the Stockholm declaration 1972. According to principle 21 of the Stockholm declaration 1972 "States have, in accordance with the Charter of the United Nations and the principles of

June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 13.

⁴²⁶ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, preamble.

⁴²⁷ Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p 8 (last accessed 19/06/2015).

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction."⁴³¹ This is reiterated in Principle 2 of the Rio declaration, according to which "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."⁴³² The principle of sovereignty over natural resources and the responsibility not to cause transboundary damage is included in various treaties. For example, according to Article 212(1) of the United Nations Convention on the Law of the Sea 1982, States are required to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry..."⁴³³ Another example is article 3 of the Convention on Biological Diversity 1992 whose wording repeats that of principle 21 of the Stockholm declaration 1972 and principle 2 of the Rio declaration 1992.⁴³⁴

A consequence of the *sovereignty over natural resources* principle has been the

⁴³¹ 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 21.

⁴³² 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 2.

⁴³³ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 212(1).

⁴³⁴ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, art 3 provides: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of

emergence of the principle of the duty to ensure sustainable use of natural resources.⁴³⁵ By this principle, States and peoples are required to conserve the environment and to make prudent use of natural wealth and resources for present and future generations.⁴³⁶ The harbingers of this principle can be seen in the Declaration on Permanent Sovereignty over Natural Resources 1962 which states: "The right of peoples and nations to permanent sovereignty over natural resources must be exercised in the interest of their national development and the well-being of the people of the State concerned."⁴³⁷ The principle's requirement to conserve or safeguard the environment for present and future generations is seen more clearly in Principle 2 of the Stockholm Declaration 1972 which states: "the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management as appropriate."⁴³⁸ Further, UN resolutions have subsequently reaffirmed and elaborated this principle. For example, according to article 30 of the Charter of Economic Rights and Duties of States 1974, States have the responsibility to protect and preserve their own environments for present and future generations and to ensure that activities within their jurisdictions do not cause damage to the environments of other States.⁴³⁹ This principle of sustainable use of natural resources is also reflected in the treaty regime, for example through the

areas beyond the limits of national jurisdiction."

⁴³⁵ Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> 'Conference Report Delhi 2002' p. 8 (last accessed 19/06/2015).

⁴³⁶ *Ibid*

⁴³⁷ UNGA Permanent Sovereignty Over Natural Resources UN Doc. A/5217 (1962), paragraph 1.

⁴³⁸ Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 2.

⁴³⁹ Charter of Economic Rights and Duties of States, General Assembly resolution 3281 (XXIX), 12 December 1974, reproduced in 14 ILM (1975) 251, art 30.

concept of 'maximum sustainable yield' found in the United Nations Convention on the Law of the Sea 1982.⁴⁴⁰ Another example in the treaty regime is the Convention on Biological Diversity which provides a definition of sustainable use: "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations."⁴⁴¹

Other principles elaborated by the ILA and closely related to the preceding principle of sustainable use, are the principles of *intragenerational* and *intergenerational equity*.⁴⁴² These principles require States to take into account the interests of both present and future generations respectively.⁴⁴³ They are found in both the Stockholm declaration 1972 and the Rio declaration 1992. Principle 1 of the Stockholm Declaration refers to a "... responsibility to protect and improve the environment for present and future generations."⁴⁴⁴ Similarly, principle 3 of the Rio declaration 1992 refers to meeting the needs of "present and future generations". It can be argued that the principle of *intragenerational equity* includes developed States assisting developing States through distributive justice and global partnership. Examples of assistance include direct financial assistance, access to technology, and technical assistance. Intragenerational equity is necessary to achieve sustainable development, particularly in order for the global partnership for sustainable development to secure both participation of

⁴⁴⁰ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 61 and 119.

⁴⁴¹ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, art 2.

⁴⁴² Committee on Legal Aspects of Sustainable Development. 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p 8 (last accessed 17/07/2015).

⁴⁴³ *ibid* p. 9.

⁴⁴⁴ 'Declaration of the United Nations Conference on the Human Environment' (Stockholm 5

developing countries and effective implementation.⁴⁴⁵ While various treaty provisions and some State practice can be noted in this regard, intragenerational equity has, as yet, not received a widespread acceptance in practice.⁴⁴⁶ It must therefore be concluded that intragenerational equity is presently an emerging principle of international law in the field of sustainable development.⁴⁴⁷ The principle of intergenerational equity too is still an emerging one in international law being confined to areas such as the law of the sea and international environmental law.⁴⁴⁸

In contrast, the principle of *common but differentiated responsibilities* has a firm status in various fields of international law, including international trade law and prominently in international environmental law and has also been elaborated by the ILA as it relates to sustainable development.⁴⁴⁹ Principle 7 of the Rio declaration states: "In view of the different contribution to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."⁴⁵⁰ Another example is the Stockholm declaration 1972 according to which all States have the common responsibility to conserve and protect the environment, but developing countries require technical and financial assistance in order to do so. Principle 12 of the Stockholm declaration states:

June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 1.

⁴⁴⁵ Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p 9 (last accessed 17/07/2015).

⁴⁴⁶ *ibid.*

⁴⁴⁷ *ibid.*

⁴⁴⁸ *ibid.*

⁴⁴⁹ *ibid.* p. 9.

⁴⁵⁰ 'Rio Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992)

*resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.⁴⁵¹

Perhaps the best example here is the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol whose objective is to achieve the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.⁴⁵² Article 3 of the UNFCCC states: "the parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their *common but differentiated responsibilities* and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."⁴⁵³ The rationale for differentiation is twofold: Firstly, it is recognised that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries and they should therefore take the lead in combating climate change, whereas emissions in developing countries are still relatively low.⁴⁵⁴ Secondly, developing countries need technical and financial resources in order to be able to achieve sustainable development.⁴⁵⁵ The principle of common but differentiated responsibilities is being implemented in various ways,

UN Doc A/CONF.151/28 (vol. I) Principle 7.

⁴⁵¹ Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 12. Also principle 23.

⁴⁵² United Nations Framework Convention on Climate Change (adopted 05 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC), art 2. Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol) (adopted 11 December 1997, came into force 16 February 2005) 37 ILM 22 (1998).

⁴⁵³ *Ibid* art 3. The principle of common but differentiated responsibilities is also reflected in the preamble and art 4 of the UNFCCC.

⁴⁵⁴ *Ibid* preamble paragraph 3 and art 3.

⁴⁵⁵ *Ibid* for example art 4(3), preamble.

including different standards for developing countries (for example, no quantitative reduction commitments in the field of climate change), delayed compliance time tables (for example, ozone layer arrangements) and undertakings conditioned upon receipt of additional financial assistance and access to technology (for example, as found in the Convention on Biological Diversity).⁴⁵⁶ In the context of international trade law, a WTO Panel explicitly endorsed the principle of common but differentiated responsibilities in a leading case where it urged Malaysia and the United States to co-operate "...in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that *States have common but differentiated responsibilities to conserve and protect the environment*".⁴⁵⁷

The interpretation of the principle of common but differentiated responsibilities particularly as enumerated in Principle 7 of the Rio declaration, is not without contention, and this debate, is itself, important in the legal process understanding of law. The debate over the interpretation of principle 7 of the Rio declaration was particularly contentious at the World Summit on Sustainable Development held in Johannesburg in 2002. Developing countries were keen to stress the necessity of differentiation in promoting developmental opportunities, developed States were unwilling for the principle to be misused as an 'open cheque' i.e. it was one thing to apply the principle in the broad, but still ultimately defined, context of global

⁴⁵⁶ Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p 10 (last accessed 20/07/2015).

⁴⁵⁷ *United States-Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 by Malaysia*, Report of the Panel, WT/DS58/AB/RW, 22 October 2001. The WTO agreements contain numerous special and differential treatment provisions and examples have

environmental protection but yet another thing for it to be used as a general principle of international development law.⁴⁵⁸ Both developed and developing States used the text of principle 7 to justify their position, which without surprise was unable to provide a definitive answer to the debate.⁴⁵⁹ Language such as the following was ultimately used: "To this end, we commit ourselves to undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles, including, *inter alia*, the principle of common but differentiated responsibilities as set out in principle 7 of the Rio Declaration on Environment and Development."⁴⁶⁰ By including principle 7 within the context of the Rio Declaration, the sense was that this satisfied both the position of developing States that differentiation was a key aspect of achieving sustainable development whilst respecting the developed States' approach which did not wish to emphasise principle 7 over and above the other principles of the Rio Declaration.⁴⁶¹

Another principle identified by the ILA is that of the *common heritage of humankind*.⁴⁶²

This principle entails non-appropriation, non-exclusive and peaceful use, international

been illustrated in the preceding Aspirational Law and Hard Development Law chapters.

⁴⁵⁸ Committee on International Law on Sustainable Development, 'International Law on Sustainable Development-First Report' in International Law Association Report of the Seventy First Conference (Berlin 2004) (International Law Association, Berlin 2004). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1017> Conference Report Berlin 2004 p 10 (last accessed 20/07/2015).

⁴⁵⁹ *ibid*.

⁴⁶⁰ 'Johannesburg Declaration on Sustainable Development' (Johannesburg 26 August-4 September 2002) UN Doc A/CONF.199/20, Plan of Implementation, paragraph 2.

⁴⁶¹ Committee on International Law on Sustainable Development, 'International Law on Sustainable Development-First Report' in International Law Association Report of the Seventy First Conference (Berlin 2004) (International Law Association, Berlin 2004). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1017> Conference Report Berlin 2004 p 10 (last accessed 20/07/2015).

⁴⁶² Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p 10 (last accessed 20/07/2015).

management, equitable sharing of benefits and reservation for intergenerational equity of those areas beyond national sovereignty and jurisdiction i.e. the global commons including the deep sea-bed and its resources, outer space and its celestial bodies such as the moon, and in some respects Antarctica.⁴⁶³ The principle of the common heritage of humankind has been codified in Part XI of the United Nations Convention on the Law of the Sea Convention 1982 and the 1979 Agreement Governing the Activities on the Moon and Other Celestial Bodies (Moon Treaty).⁴⁶⁴ Proposals have been made that these principles could also be extended to, for example, tropical rain forests, wetlands of international importance or the environment as such and what belongs to all of us, such as major ecological systems of our planet.⁴⁶⁵ Currently, this is reflected in the concept of *common concern of humankind* and can be found in for example the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity.⁴⁶⁶ The concept of *common concern of humankind* is more vague than the common heritage principle, obviously not implying non-appropriation and an international regime.⁴⁶⁷ However, it still embodies the goal of preserving the environment and taking into account the needs of present and future generations and in

⁴⁶³ *ibid* p. 10.

⁴⁶⁴ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, and Agreement Governing the Activities on the Moon and Other Celestial Bodies (adopted 18 December 1979, entered into force 11 July 1984) 1363 UNTS 21.

⁴⁶⁵ Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p 10 (last accessed 21/07/2015).

⁴⁶⁶ United Nations Framework Convention on Climate Change (adopted 09 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC), the preamble states: "acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind," Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, the preamble states: "affirming that the conservation of biological diversity is a common concern of humankind."

⁴⁶⁷ Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at

this sense is linked to the principles of sustainable use of natural resources and intra- and intergenerational equity.

A key principle of sustainable development law, as noted above, is the 'precautionary principle', or the 'precautionary approach'. The emergence of the precautionary approach is reflected in the Rio Declaration 1992 and multilateral treaty law. The Rio Declaration affirmed existing principles of international law. For example, Principle 2 of the declaration affirms that, in accordance with the Charter of the United Nations and the principles of international law, States have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, but this is qualified by the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁴⁸⁸ The Rio Declaration provides unequivocally in Principle 15: "in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." A number of policy prescriptions were addressed directly at States for inclusion in, for example, their national legislation. For example according to Principle 11 of the Rio declaration, states are to enact effective environmental legislation.⁴⁸⁹ Further, environmental standards, management objectives and priorities are to reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in

<http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p 10 (last accessed 21/07/2015).

⁴⁸⁸ Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 2.

particular developing countries. Principle 17 prescribes environmental impact assessments, as a national instrument, to be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.⁴⁷⁰

The principle can be found in various multilateral treaties, for example the Vienna Convention on the Ozone Layer and its Montreal Protocol,⁴⁷¹ the Cartagena Protocol on Biosafety to the Convention on Biological Diversity whose objective is based on the precautionary approach;⁴⁷² and the UN Fish Stocks Agreement⁴⁷³. Further, the precautionary approach is quickly gaining firm ground in a number of regional regimes and domestic laws.⁴⁷⁴ There is increasing emphasis on the duty of States to take preventive measures to protect the human health, natural resources and the environment, via for example environmental impact assessments.

Another key principle in the Rio Declaration was its call for *public participation and access to information and justice*. It coincided with the lobbying of many citizens

⁴⁶⁹ *ibid* principle 11.

⁴⁷⁰ *ibid* principle 17.

⁴⁷¹ Preamble of the Convention for the Protection of the Ozone Layer (adopted 22 March 1985, came into force 22 September 1988), 1613 UNTS 323; Preamble of the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989); 1522 UNTS 3.

⁴⁷² Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003) 2226 UNTS 208, art 1 states: "in accordance with the precautionary approach contained in Principle 15 of the Rio declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring the adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health and specifically focusing on transboundary movements."

⁴⁷³ United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) A/CONF.164/37, Part II art 6 and 6, Annex II.

⁴⁷⁴ Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development-Fifth and Final Report' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/26> Conference Report Delhi 2002 p 11 (last

movements for more participatory processes of national and international decision-making and with the increased status of human rights.⁴⁷⁵ Principle 10 of the Rio declaration encapsulates this principle: “environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”⁴⁷⁶ The Rio declaration also identifies the participation of particular groups as being vital to the achievement of sustainable development i.e. the participation of women (principle 20)⁴⁷⁷ and the participation of indigenous groups (principle 22)⁴⁷⁸. In international environmental law this was entrenched, most notably in the Treaty of Aarhus on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters concluded in 1998 under the auspices of the UN Economic Commission for Europe.⁴⁷⁹

Lastly, there is also the principle of *good governance including democratic accountability*.⁴⁸⁰ The 1997 UNDP policy document *Governance for Sustainable Human*

accessed 21/07/2015).

⁴⁷⁵ *Ibid.*

⁴⁷⁶ Declaration on Environment and Development’ (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 10.

⁴⁷⁷ *Ibid* principle 20.

⁴⁷⁸ *Ibid* principle 22.

⁴⁷⁹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 28 June 1998, entered into force 30 October 2001) 2161 UNTS 447. As the title states, the aim of this Convention is to guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters.

⁴⁸⁰ Committee on Legal Aspects of Sustainable Development, ‘Legal Aspects of Sustainable Development-Fifth and Final Report’ in International Law Association Report of the Seventieth

Development defines good governance as follows: "Good governance ensures that political, social and economic priorities are based on a broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources."⁴⁸¹ The Cotonou Agreement of June 2000 also provides a definition: "...good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption."⁴⁸²

7.4 Adjudicative Arena of Authority:

The adjudicative arena of authority characterised by third party decision, includes the numerous international tribunals and courts. Adjudicatory bodies that have addressed sustainable development, include the International Court of Justice, and the Permanent Court of Arbitration; WTO Panels and the Appellate Body; International Centre for International Settlement of Investment Disputes; and NAFTA tribunal. Others are social and human rights courts and tribunals such as the African Court on Human and Peoples Rights and the European Court of Human Rights. There are a number of

Conference (New Delhi 2002) (International Law Association, London 2002). Also available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> Conference Report Delhi 2002 p 11 (last accessed 22/07/2015).

⁴⁸¹ Available at <http://www.pogar.org/publications/other/undp/governance/undppolicydoc97-e.pdf> (last accessed 22/07/2015).

⁴⁸² Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part (Cotonou Agreement) (adopted 23/06/2000, entered into force 01/04/2003) ACP/CE/en 123, art

examples of these courts and tribunals addressing sustainable development, including:

*Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*⁴⁸³; the dispute before the International Court of Justice, arose in connection with the planned construction authorised by Uruguay of a pulp mill and the construction and commissioning of another, also authorised by Uruguay. The River Uruguay forms the boundary between the two States, Argentina and Uruguay, as established by a bilateral treaty. In 1975, Argentina and Uruguay concluded the Statute of the River Uruguay.

The purpose of the Statute of the River Uruguay was the establishment of joint machinery for the optimal and rational utilisation of the river (Article 1).⁴⁸⁴ The Statute of the River Uruguay established a Commission for the management of the River, the Administrative Commission of the River Uruguay (CARU) (Article 49).⁴⁸⁵ Argentina's complaint was that the pulp mills that Uruguay authorised on the Uruguayan side of the river would cause environmental damage to the river and to Argentine territory. The International Court of Justice (ICJ) decided that Uruguay breached the procedural obligations contained in the 1975 Statute, namely, the obligation to inform CARU and Argentina of the activities that it planned to undertake in the river. The Court however, also decided that Argentina failed to prove that significant environmental damage would occur. Therefore, the operation of the pulp mill could continue. In arriving at its decision, the Court made use of sustainable development in its reasoning as follows:

The 1975 Statute of the River Uruguay did not explicitly mention sustainable development as one of its objectives but the Court was able to find that the Statute did in fact encompass sustainable development. The Court recalled article 1 of the Statute

9(3).

⁴⁸³ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14.

⁴⁸⁴ *Ibid* paragraphs 170-177.

⁴⁸⁵ *Ibid* paragraphs 84-93.

which stated its objective i.e. the optimal and rational utilisation of the River Uruguay. However, as the treaty included provisions for the prevention of pollution and the protection of the river environment, the Court interpreted "optimal and rational utilisation" as akin to sustainable development. The Court considered that the attainment of optimum and rational utilisation required a balance between the parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other.

The ICJ explicitly referred to sustainable development in its analysis of the relationship between the procedural and the substantive obligations contained in the 1975 Statute of the River Uruguay. In this regard, the Court recalled its 2006 decision on the request of provisional measures by Argentina:

The Court observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States."⁴⁸⁶ The Court held that, the particular way in which economic development and the protection of the environment may be reconciled has to be decided by the parties themselves, citing its previous decision in the *Gabčíkovo-Nagymaros* in support of this view. In the *Gabčíkovo-Nagymaros* case, the Court, after recalling that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development", added that "[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty".⁴⁸⁷

⁴⁸⁶ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 para 75.

⁴⁸⁷ *ibid* paragraph 75.

Argentina submitted that Uruguay violated the procedural obligations established in the Statute of the River Uruguay and that a breach of the procedural obligations implied also a breach of the substantive obligations as the two categories of obligations were indivisible. However, the Court noted that the Statute of the River Uruguay created CARU and established procedures in connection with that institution so as to enable the parties to fulfil their substantive obligation. The Court found that nowhere did the 1975 Statute indicate that a party may fulfil its substantive obligations by complying only with its procedural obligations, nor that a breach of procedural obligations automatically entailed the breach of substantive ones. Further, the Court reasoned, the fact that the parties had complied with their substantive obligations did not mean that they were deemed to have complied *ipso facto* with their procedural obligations, or were excused from doing so.⁴⁸⁸ The Court concluded that Argentina and Uruguay had put in place a system of co-operation to manage the risks of damage to the river environment. In the view of the Court, the procedural obligation to inform CARU, allowed for the initiation of co-operation between the parties which was necessary in order to fulfil the substantive obligation of prevention. In the opinion of the Court, the obligation to notify was intended to create conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause. The Court held that Uruguay violated the obligation to inform, notify and negotiate, but not that this violation meant it had also violated its substantive obligations.

The Court also found that an environmental impact assessment was necessary to fulfil the obligation of prevention of environmental harm: "it is the opinion of the Court that in

⁴⁸⁸ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 para 78.

order for the parties properly to comply with their obligations under Article 41 (a) and (b) of the Statute they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment."⁴⁸⁹ The Court interpreted of Article 41 of the Statute of the River Uruguay in accordance with developments in the field of environmental law: "the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works."⁴⁹⁰ Argentina and Uruguay agreed with the necessity of conducting an environmental impact assessment, but disagreed on the scope and content of the environmental impact assessment that Uruguay should have carried out with respect to the mill project. Argentina wanted the ICJ to accept its view that international law establishes the specific scope and content of environmental impact assessments. The Court however, did not accept Argentina's contentions. Rather, the ICJ held that the scope and content of an environmental impact assessment has to be determined by each State in its domestic legislation or in the authorisation process for the project. "having regard to the nature and magnitude of the proposed development and its likely adverse impact on

⁴⁸⁹ Ibid paragraph 204.

the environment as well as to the need to exercise due diligence in conducting such an assessment”.⁴⁹¹

Argentina also claimed that Uruguay breached a number of substantive obligations regarding the protection of the River Uruguay and its environment. The Court concluded that Argentina failed to produce sufficient evidence of the alleged breaches of substantive obligations and that on the facts, Uruguay had not breached its substantive obligations. In reaching this decision the Court applied the traditional rule that *onus probandi incumbit actori* whereby it is the duty of a party which asserts certain facts to establish the existence of such facts.⁴⁹² Argentina had submitted that the burden of proof had to be shared equally between the two Parties because the 1975 Statute included a precautionary approach. While the Court accepted that the precautionary approach might be relevant to the interpretation and application of the provisions of the treaty, it did not accept that it followed that this resulted in a reversal of the burden of proof. The Court found that there was nothing in the Statute to indicate that the burden of proof was placed on both parties.

This case is significant because it not only explicitly applied sustainable development, but also endorsed important aspects of sustainable development such as environmental impact assessments, the precautionary approach, as well as showing how the burden of proof operates in such cases.

The following briefly considers cases of regional human rights bodies that have addressed sustainable development:

⁴⁹⁰ *Ibid*

⁴⁹¹ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 paragraph 205.

⁴⁹² *Ibid* paragraph 162.

in *Borysiewicz v Poland* (*European Court of Human Rights*, 1 July 2008)⁴⁹³ the applicant lived in Pabianice in a semi-detached house in a residential area, with a tailoring workshop employing around 20 people in the other half of the building. The applicant complained that Poland had breached Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on account of the failure to protect her home from the noise pollution arising from the operation of the workshop. A string of decisions of the European Court of Human Rights has considered article 8(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." The court recalled its jurisprudence on article 8, including the need for an applicant in cases such as this to demonstrate that the interference directly affects the applicant's home, family or private life, and reaches a certain level of severity. In this case the applicant had not submitted any evidence which established that her health or that of her family had been affected by the noise from the workshop. As such the court found that it could not be established that Poland had not taken reasonable measures to protect the applicant's rights under article 8. The court did, however, find that the length of proceedings commenced by the applicant in the Polish legal system were excessively lengthy, and therefore in breach of Article 6(1) of the ECHR. Although no finding of a violation of article 8 of the ECHR was made on the facts, this case is significant as the court reaffirmed the link between human rights and environmental issues, reflecting the integration principle of sustainable development.

In *Tatar v Romania* (*European Court of Human Rights*, 27 January 2009)⁴⁹⁴ the

⁴⁹³ *Borysiewicz v Poland*, no. 71146/01, ECHR 2008.

⁴⁹⁴ *Tatar v Romania*, no. 57021/01, ECHR 2009.

applicants, were residents of Baia Mare (Romania). They were affected by an accident at a nearby gold mine that resulted in the release of around 100,000 cubic metres of cyanide-contaminated tailings water into the environment. The company that run the gold mine used an extraction process that involved the use of sodium cyanide. Following the accident, the applicants brought several unsuccessful complaints against the mine company through the Romanian domestic legal system. In the ECHR, the applicants invoked Article 2(1) of the ECHR, which provides that '[e]veryone's right to life shall be protected by law'. The applicants complained that the technological process used by the company endangered their lives and that the Romanian authorities had failed to take action in spite of their numerous complaints within the domestic legal system. At the admissibility stage of the proceedings, the court concluded that the complaint was more appropriately considered as a potential violation of Article 8(1) of the ECHR. In its decision on the merits, it was found that States are under an obligation by operation of Article 8(1) to adopt such measures as are necessary to control industrial activities that pose a risk to human health and the environment. The court acknowledged that pollution may interfere with a person's private and family life by harming his or her well-being. On the particular facts of the case, the court held unanimously that Romania had not discharged its obligations to protect the applicant's right to private and family life. There was a clear risk to the health and well-being of the applicants as a result of the operation of the mine. Romania had as a consequence a duty to ascertain the level of risk of the mining operations, before and after the incident. In 1993 an environmental impact assessment had identified the risks, but had not led to the imposition of appropriate operating conditions. Moreover, following the accident, the Romanian authorities permitted the mine to continue operating, a decision which was found by the court to be contrary to the precautionary principle. According to the court,

the precautionary principle provides that lack of certainty with regard to scientific and technological knowledge could not be used as a justification by states to delay the adoption of effective and proportionate measures to protect the environment. The court's pronouncement mirrors the precautionary principle as set out in Principle 15 of the 1992 United Nations Declaration on Environment and Development (the Rio Declaration). The court also found that the Romanian authorities were under a duty to provide information to the public in relation to the risks involved in the operation of the gold mine and particularly needed to ensure that the public had access to the conclusions of investigations and studies into the operations of the mine. This had not occurred, as the 1993 environmental impact assessment had not been publicly released, thereby preventing citizens from challenging the decision to grant the mine's operating license. This was held to constitute a breach of Article 8(1). It was significant in this regard that the court cited the 1998 Aarhus Convention. The applicants had sought to identify a causal link between the son's asthma condition and the pollution. However, the Court did not accept this submission, and as a consequence, there were no damages awarded by way of just satisfaction. It may be noted that in relation to this point, judges Zupancic and Gyulumyan dissented, noting that in pollution cases it is often difficult to establish with absolute certainty a causal linkage between the pollution and the injury.

This case is significant with regard to sustainable development as it applies and reaffirms the precautionary principle, the principle of participation and access to information and justice, as well as the integration principle (i.e. of human rights and environmental issues).

The case of Leon and Agnieszka Kania v Poland (European Court of Human Rights, 21

July 2009)⁴⁸⁵ concerned noise and pollution emitted from a craftsmen's co-operative established next to the applicants' home. The cooperative's commercial activities included maintenance services for lorries and use of metal cutting and grinding machines. The applicants complained that the noise and pollution caused by the cooperative's activities led to their sustaining very serious and long-term health problems, including heart and hearing complaints. The applicants based this complaint on article 8 of the ECHR. The applicants further contended that the length of time, about 20 years, that it took to have a final administrative decision issued and implemented had been incompatible with the "reasonable time" requirement set out in Article 6 of the ECHR ("In the determination of his civil rights and obligations...everyone is entitled to a...hearing within a reasonable time by [a]...tribunal").

With regard to article 6 of the ECHR, the court reiterated that it had frequently found violations of article 6 in cases raising similar issues. The court held that Poland had not justified the length of the administrative proceedings and was in breach of article 6 of the ECHR. With regard to article 8 of the ECHR the court repeated its longstanding jurisprudence that there is no explicit right in the ECHR to a clean and quiet environment, but that where a person is seriously and directly affected by noise or other pollution, an issue under article 8 may arise. In addition, the court noted that article 8 may apply in environmental cases, whether the pollution is the result of state action directly, or by the state's failure to properly regulate the activities of the private-sector. Having regard to: the numerous inspections carried out by the Polish authorities of the cooperative's premises, which found that the co-operative's activities did not cause a nuisance, nor did it exceed the permissible levels of noise; of the fact that the cooperative eventually ceased its activities; and lastly, the fact that the applicants failed

⁴⁸⁵ *Leon and Agnieszka Kanie v Poland* (European Court of Human Rights, 21 July 2009) no.12605/03, ECHR 2009.

to submit medical evidence to support their claim that they had sustained serious and long-term health problems as a result of the noise and pollution, the court concluded that it could not be established that the state had failed to take reasonable measures to secure the applicants' rights under article 8 of the ECHR. By the court's admission there is a high threshold to be reached to establish a case on the basis of article 8 of the ECHR in cases dealing with environmental issues, but the threshold exists nonetheless.

This case reflects the integration principle of sustainable development i.e. integration of human rights with environmental issues.

A case in which the high threshold required to establish a claim on the basis of article 8 of the ECHR in environment cases was met is *Oljić v Croatia* (European Court of Human Rights, 20 May 2010).⁴⁹⁶ The applicant owned a part of a house in which she lived with her family. A bar had been run in the other part of the house for a period of about 8 years. The bar opened from 7 a.m. until midnight each day, and played loud music particularly at night. The level of noise in the applicant's part of the house was found to exceed permitted levels by independent experts. The applicant found the outcome of the proceedings under Croatia's domestic law unsatisfactory and complained that Croatia had failed to protect her from excessive noise and from being disturbed at night, contrary to Article 8(1) of the ECHR. The court noted that the level of noise exceeded the international standards as set by the World Health Organisation and most European countries. The Court found that the case was similar to *Moreno Gómez v Spain* (2004)⁴⁹⁷ which concerned noise from nightclubs. The court distinguished cases such as *Borysiewicz v Poland* (2008) and *Leon and Agnieszka*

⁴⁹⁶ *Oljić v Croatia*, no. 61260/08 ECHR 2010.

⁴⁹⁷ *Moreno Gómez v Spain*, no. 4143/02 ECHR 2004-X.

Kania v Poland (2009) , and on the evidence, which included medical evidence, found that the severity of the noise complained of, over a long period of eight years, was excessive, and in contravention of national and international standards. The court therefore held that Croatia had failed to discharge its positive obligation to guarantee the applicant's rights under article 8 of the ECHR.

In *Mossville Environmental Action Now v United States (Inter-American Commission on Human Rights, 17 March 2010)*⁴⁵⁸ the petitioners, presented on behalf of residents of Mossville in Louisiana, a complaint that Mossville residents were suffering a range of health problems caused by the activities of over a dozen chemical factories in and around the city. Since the 1930s fourteen industrial facilities for the manufacture, processing and storing of toxic and hazardous chemicals were established in or near the town. The petitioners claimed that this had led to a number of health problems, with over 90 per cent of residents reporting at least one disorder related to exposure to the chemicals produced at the factories. According to the petitioners, the disorders included those relating to the nervous system (84% of the residents surveyed), cardiovascular problems (71%) and skin problems (57%). Further, the petitioners claimed that the toxic exposure affected the mental health of some of the residents. The toxic chemicals found included dioxins, with residents being found to have in their blood concentrations, dioxins three times the national average. On the basis of Article II of the American Declaration of the Rights and Duties of Man (American Declaration), the petitioners claimed that Mossville residents, most of whom were African-Americans, were subjected to a disproportionate pollution burden which resulted in 'environmental racism' in contravention of their right to equality before the law. The petitioners also

⁴⁵⁸ *Mossville Environmental Action Now v United States*, Admissibility, Petition 242-05, Inter-American Court of Human Rights Report No 43/10, 17 March 2010.

claimed that in breach of Articles I, V, IX, XI and XXIII of the American Declaration, Mossville residents' rights to life, health and private life in relation to the inviolability of the home were violated. In its decision on admissibility, the Inter-American Commission on Human Rights (the Commission) concluded that the complaint was admissible with respect to the allegations concerning Articles II and V of the American Declaration. Article II of the American Declaration provides that 'all persons are equal before the law and have the rights and duties established in this declaration, without distinction as to race, sex, language, creed or any other factor'. Article V provides that 'every person has the right to the protection of the law against abusive attacks upon his honour, his reputation, and his private and family life.' The United States contested the admissibility of the application, contending, inter alia, that the petitioners had failed to exhaust local remedies. The United States also contended that there was no such right as the right to a healthy environment either in its own terms, or as part of the rights to life, health, privacy and inviolability of the home, or equal protection and freedom from discrimination. The United States further contended that there was no substantive right of individuals to a safe or healthy environment found either in treaties to which the United States was a party, or under customary international law. In addition, even if there was such a right, the United States had never accepted such a rule, and would be a 'persistent objector' of such a customary norm and therefore could not be bound by it. In response and in relation to exhausting local remedies, the petitioners submitted that federal and state law did not afford them a remedy for the violations of the human rights they were claiming. To illustrate, it was noted that the right to health was not recognised in the United States Constitution, that the Supreme Court jurisprudence showed that only purposeful acts of discrimination constitute a violation of the equal protection guarantee in the Constitution, and that the right to privacy did not extend to include the

circumstances of the case.

The Commission held that the claims regarding disproportionate discriminatory pollution would very likely fail if pursued through domestic proceedings, and that therefore, the petitioners were not required to exhaust local remedies in accordance with the Commission's Rules of Procedure. The Commission further held that proceedings concerning rights to privacy and inviolability of the home would also fail. However, with regard to the right to life and to personal integrity, the Commission was not satisfied of the futility of challenging the actions of the Environment Protection Agency in establishing pollution standards. With regard to the claim of 'environmental racism' upon Mossville residents as African- Americans, the Commission noted that the right to equal protection under international human rights law is interpreted as prohibiting intentional discrimination *and* any distinction, exclusion, or restriction that has a discriminatory effect. The Commission therefore concluded that the claims could potentially establish a violation of the right to equality before the law, as contained in Article II of the American Declaration.⁴⁹⁸ In relation to the rights to privacy and inviolability of the home, the Commission noted that it had previously found that the provisions of the American Declaration needed to be interpreted in the context of international human rights law more generally, and having regard to other relevant rules of international law applicable to member states. While the complaint concerning the right to privacy (Article V) was therefore admissible, there were no facts presented that would demonstrate how the right to inviolability of the petitioners' homes (Article IX) had been violated. Article IX on the right to inviolability of the petitioners' homes is similar to article 8 of the ECHR in its protection of private and family life. Similar to the European Court of Human Rights' jurisprudence, the Commission indicated that there may be

⁴⁹⁸ Adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, EA/Ser.L.V/II.82 doc.6

instances when this right may be violated in environment cases, albeit, this was not found to be the case on the facts presented in the *Mossville* case.

There has been a similar reliance on sustainable development in national courts. For example, the South African Constitutional Court, noted in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*⁵⁰⁰ that "[t]he Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment." The Constitutional Court also considered the role of courts in ensuring that the responsibility of sustainable development is complied with and that the environment is protected for present and future generations. It stated: "[t]he role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust

rev. 1 at 17 (1992).

⁵⁰⁰ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).

for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out.” The court endorsed the meaning of sustainable development in international law instruments, particularly, the Rio declaration (1992) and the Johannesburg declaration (2002). The court held that as in international law, the concept of sustainable development has a significant role to play in the resolution of environmentally related disputes by providing a framework for reconciling socio-economic development and environmental protection.

7.5 Conclusion

From the foregoing, pillars of a development law under the legal process understanding of law can be identified. Firstly, there are a number of participants in development law : States are key participants with groups such as the developed states group of seven (G-7) and the developing states group of seventy-seven (G-77) playing a major role in elaborating development law. Intergovernmental organisations are also important participants with the United Nations and associated bodies such as the UN Commission on Sustainable Development and the United Nations Environmental Programme playing a key role. Other participants include nongovernmental organisations, representative groups and associations covering for instance business and industry, scientific and technological communities, lawyers and individuals. Secondly there are various decision outcomes each performing a particular function. For example Agenda 21 appraises the goals related to economic development and environmental protection including achieving relative equality between developed and developing countries. Several provisions of the Rio declaration promoted or advocated for fulfillment of the right to development, for common but differentiated responsibilities

and for effective participation in environmental and development processes.

Thirdly, there are prescriptive principles, namely intergenerational and intragenerational equity; common but differentiated responsibilities; sustainable use of natural resources; the precautionary principle; the principle of participation; good governance; and integration (i.e. of social, economic, environmental and human rights objectives). There are also general principles of international law that apply to sustainable development, namely, the rule of law in international relations, the duty to co-operate towards sustainable development and protection of the environment and the observance of human rights.

Fourthly, all this takes place in arenas of authority. Key arenas of authority for international development law are United Nations development conferences such the United Nations Conference on Environment and Development (Rio conference). Other important arenas of authority are the adjudicatory bodies that have addressed sustainable development such as the International Court of Justice and the European Court of Human Rights.

The general critique that legal process conflates law and policy needs to be addressed.

The criticism is made from a traditional positivist standpoint which sees international law as a body of 'rules'. By contrast, legal process conceives of international law as a continuing process of authoritative and controlling decision-making. A response to this criticism, which I align myself with in this chapter, is aptly put by Higgins:

"Policy considerations, although they differ from 'rules', are an integral part of that decision making process which we call international law; the assessment of so-called extralegal considerations is part of the legal process, just as is reference to the accumulation of past decisions and current norms. A refusal to acknowledge political and social factors cannot keep law 'neutral', for even such

a refusal is not without political and social consequence. There is no avoiding the essential relationship between law and politics”⁵⁰¹

Seen this way, international development law is comprised of, but is not limited to rules. International development law is comprised of a variety of legal phenomena. However, not ‘everything’ is law. Only those decisions that are authoritative and controlling are legally valid i.e. made by those expected to make them (the participants) in settings within which they ought to be made (arenas of authority). The decision outcomes also perform clear functions.

⁵⁰¹ R. Higgins, *Problems and Process, International Law and How We Use It*, New York, Oxford University Press, 1996, p. 5.

CHAPTER 3

CONCLUSION

The aim of this thesis was to consider the different understandings of what 'law' is and to apply this to the specific area of international development law. This was so as to gain a clearer understanding of the basis of international development law and its status.

Two central questions were addressed. Firstly, what is the basis of international development law? In other words, in what sense can international development law be spoken of as 'real' or 'true' law? Secondly, and a precursor to the first question was the consideration of what stands as 'real' law.

These two central questions follow from a few other preliminary questions. Firstly, what is 'international development law'? Secondly, what are the sources of international development law? Thirdly, who formulates international development law? Fourthly, what characteristics or criteria can one use to identify 'law' and thus identify international development law as true 'law'?

The significance of having undertaken this study can be seen as two-fold. Firstly international development law emerged from calls for a new international order, itself an offshoot of calls for a new international economic order (NIEO). Some have argued that the NIEO debate including the debate on the need for a new international legal order and by extension international development law, grew stale, and eventually died. However, there is a strong argument against this as the legal aspects of the NIEO can

be seen in contemporary international instruments. To illustrate, principles contained in the Declaration on the Establishment of a New International Economic Order of 1974, an original document of international development law can be seen in contemporary international instruments as the following examples illustrate: the principle of extending assistance to developing countries found in article 4(i) and 4(k) of the declaration can be seen today in Article 66.2 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)⁵⁰² which creates an obligation on developed countries to transfer technology to developing countries. Article 66 of TRIPS provides that developed country members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country members. The objective of the obligation stipulated in Article 66 of TRIPS is to enable developing country members to create a sound and viable technological base. This principle is hardened through a monitoring mechanism. Under this monitoring mechanism, developed country members are required to submit reports annually on actions taken or planned in pursuance of their obligations under Article 66. Further, under the monitoring mechanism, developed countries are to provide new detailed reports every third year and updates in the intervals. These reports are reviewed regularly at the TRIPS Council's end of year meetings.

The principle of preferential treatment for developing countries found in article 4(n) and 4(s) of the Declaration on the Establishment of a New International Economic Order is a prominent feature of the WTO Uruguay Round Agreements seen in the numerous special and differential treatment provisions and continues today in the Doha Round. An example is the Enabling Clause which created a permanent legal basis for the Generalised System of Preferences in the WTO. On "the need for developing countries

⁵⁰² Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C/IP/1.

to concentrate all their resources for the cause of development” (article 4r of the declaration on the establishment of a new international economic order), this principle can be seen in, for example, the Millennium Declaration⁵⁰³.

Secondly, not only are the legal aspects of the NIEO still relevant, there is a growing body of international development law provisions and instruments. International development law sources are numerous and cut across the whole gambit of relations between developed and developing countries. There are instruments dealing with the environment, for example the United Nations Framework Convention on Climate Change, the Vienna Convention on the Protection of the Ozone Layer and the Biological Diversity Convention. Other important instruments are declarations, for example the Stockholm Declaration (1972), the Rio Declaration (1992) and the Millennium Declaration (2000). There are instruments dealing with trade, for example the special and differential treatment provisions of the WTO agreements. There are human rights instruments, for example the Universal Declaration on Human Rights and relevant provisions of the Charter of the United Nations.

Despite the continued relevance of the legal aspects of the NIEO debate, and the growing body of instruments, there is a dearth of current literature on the notion of international development law and its legal validity.

3.1 Findings

Differentiation of responsibilities as a central tenet of international development law is still key but has evolved. When the notion of international development law emerged,

⁵⁰³ UNGA United Nations Millennium Declaration, UN Doc A/55/L.2 (2000) for example paragraphs 5 and 14.

the literature identified 'duality of norms', whereby one norm applies to developed countries and another differential norm applies to developing countries, as a central principle. For example, developing countries were permitted to derogate from the rules of GATT i.e. they were exempted from GATT rules of reciprocity and nondiscrimination. A contemporary example of duality of norms can be seen in the Agreement on Agriculture,⁵⁰⁴ where LDCs are exempted from making any reduction commitments, whilst developing and developed countries undertook reduction commitments. Duality of norms has evolved and it is now more usual for responsibilities between developed and developing countries to be common but differentiated. For example: the aspirational law chapter identified the United Nations Framework Convention for Climate Change (1994) whereby responsibilities between developed and developing countries are common, but developed countries have an obligation to meet the costs incurred by developing country parties in complying with their obligations (Article 12) i.e. developing countries' obligations are differentiated on the basis of being conditional on receipt of financial assistance from developed country parties; the declaratory law and law as process chapters identified common and differentiated responsibilities in the Rio Declaration (1992) whereby the developed countries acknowledged the responsibility they bear in the international goal of sustainable development given the pressures their societies place on the global environment and of the technologies and financial resources they command (principle 7); the law as process chapter also identified the principle of common and differentiated responsibilities as one of the seven core principles of sustainable development of the International Law Association's (ILA) New Delhi Declaration; the hard development law chapter identified the WTO Agreement on Agriculture, whereby developing countries undertook "lesser"

⁵⁰⁴ Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 <http://docsonline.wto.org> (accessed 25 August 2014).

commitments than developed countries. For example, under the Agreement on Agriculture, developing countries are obliged to reduce their tariffs on average by 24 per cent over 10 years, whilst developed countries are required to reduce their tariffs by 36 per cent over 6 years. Another example of common but differentiated responsibilities identified by the hard law chapter is that of transition time periods, for example, Article 65 of TRIPS provides that a developing country member is entitled to delay for a further period of 4 years from the date of application, of the provisions of the TRIPS Agreement other than Articles 3, 4 and 5 (Article 65.2).

On the basis of common but differentiated responsibilities between developing and developed countries, we can still maintain that international development law deals with the rights and responsibilities of developing and developed countries towards each other. Underlying this is the notion of equity. This original premise of international development law between developed and developing countries can still be maintained.

The sources of international development law have also evolved. When the notion of international development law emerged, the sources were mainly United Nations declarations and resolutions dealing with economic issues. For example the original documents were the Declaration on the Establishment of a New International Economic Order and Programme of Action on the Establishment of a New International Economic Order (1974) and the Charter of Economic Rights and Duties of States (1974). Today, the sources include an ever increasing number of resolutions and declarations but also significantly, include provisions in multilateral treaties, as well as conference outcome documents representing a wide consensus, and dealing with a wider spectrum of areas including the environment, human rights, as well as trade (i.e. encompassing environmental, social and economic development). Declarations include the Rio declaration (1992), the Millennium declaration (2000), and Johannesburg declaration

(2002) which all covered the broad areas of economic, social and environmental development (these were examined in the declaratory law and law as process chapters). Multilateral treaties include the Food Assistance Convention (2013), the United Nations Framework Convention for Climate Change (1994), and the WTO agreements (1995) covering the various areas of trade (Agreement on Agriculture, Agreement on Safeguards, Agreement on Subsidies and Countervailing measures, Agreement on Trade-Related Investment Measures, Agreement on Trade-Related Aspects of Intellectual Property Rights, General Agreement on Tariffs and Trade 1994, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Technical Barriers to Trade) (these were examined in the aspirational law and hard development law chapters). These numerous sources lend support to the view that there is a body of instruments dealing with the relationship between developing and developed countries whose status as law needs examining.

There are also a number of actors involved in formulating international development law. States are predominantly the main actors. They are the parties to the multilateral treaties examined in the aspirational law and hard development law chapters. States are also the main signatories to the declarations examined in the declaratory law and law as process chapters. However, there are other actors involved in the formulation of international development law. For example about 2,400 representatives of NGOs were represented at the United Nations Conference on Environment and Development (Rio Conference 1992). At Rio NGOs exerted political pressure by lobbying state delegates including preparing reports and submitting them to the delegates. About 17,000 people, including indigenous groups, participated in the Global Forum which was a parallel conference held simultaneously with Rio. The aim of the Global Forum was to create world wide awareness of the need to link economic development to environmental

protection. Other participants at Rio, categorised into representative groups included local authorities, workers and trade unions, business and industry, scientific and technological communities, women, children and youth, indigenous people, farmers. The wide range of participants is significant. One of the earlier criticisms of international development law was that it was a political 'tool' used by developing countries to destabilise international law by passing resolutions and declarations to serve their interests in the United Nations General Assembly where they commanded a majority. However, contemporary international development law instruments are in the main, consensual instruments representing carefully balanced and negotiated texts between developing and developed countries as well as involving other representative groups.

International development law has varying legal statuses. As aspirational law, international development law represents or expresses a genuine popular aspiration, the expressed goals being those that are sincerely desired by government with subsequent legal processes demonstrating a movement towards the goal and showing a movement to hard law. As declaratory law, the principles of international development law have been articulated by states themselves, in conference outcome documents, in declarations, resolutions and charters of international bodies, in particular, the United Nations. As hard law, international development law is comprised of primary rules of obligation supported by secondary rules.

International development law also has different legal bases. As a natural law concept it is justified on the basis that it sets down principles to guide states' own behavior and provide standards by which that behavior could be judged. Setting goals and expressing values is also significant in articulating the 'common good'. As a positive law

concept it is justified on the basis of Hart's concept of law as a union of primary rules of obligation with secondary rules. As legal process, international development law is justified on the basis that decisions are made by those who are expected to make them in arenas in which they are expected to make them. There is a unifying basis to these three traditions of legal understanding and that is consensus. International development law is based on consensus between developed and developing countries.

Following the English School's conception of emerging and settled norms, we might also sum up aspirational and declaratory development law as the emerging norm and hard development law as the settled norm. International development law seen under the lens of legal process constitutes both emerging and settled norms as aspirational, declaratory and hard development law often derive from here. Following the English School criteria of an emerging norm, the wordings in resolutions and declarations are repeated and lead to further elaborations in later resolutions; the endorsement is hearty/sincere often reflected by being enshrined in a treaty and the injunction applies specifically i.e. between developed and developing countries. For example Paragraph 7 of the Doha Declaration on the TRIPS Agreement and Public Health reaffirmed the obligation of developed country members on the basis of Article 66.2 of TRIPS i.e. the obligation to give development assistance.⁵⁰⁵ This was further elaborated in the Decision of the General Council on the Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health⁵⁰⁶ and the Protocol Amending the TRIPS Agreement⁵⁰⁷, whereby members also undertook to cooperate in paying special attention to the transfer of technology and capacity building in the pharmaceutical sector on the basis of Article 66.2 of TRIPS. Another example is equity

⁵⁰⁵ WT/MIN(01)/DEC/2.

⁵⁰⁶ WT/L/540 and Corr.1

which has been affirmed and re-affirmed in numerous statements made by states to narrow the gap between rich and poor nations. Equity is declared in the declaration on the establishment of the new international economic order (1974) in the enunciation of the need to narrow "the prevailing disparities in the world" (articles 4(b) and 4(c) of the declaration on the establishment of a new international economic order). Equity is repeated in the Stockholm declaration (1972) which gave recognition to the fact that millions of people in the developing countries were living far below the minimum levels required for a decent human existence, lacking in adequate food and clothing, shelter and education, health and sanitation. The Stockholm declaration stated that for this purpose, industrialised countries should make efforts to reduce the gap between themselves and the developing countries.⁵⁰⁸ Decreasing disparities in standards of living is also repeated in the Rio Declaration 1992.⁵⁰⁹ References to equitable treatment can also be found in treaties, for example in the WTO Agreement on Agriculture (preamble).

The different aspects of 'law' in the senses presented here may be deemed to be different parts of a whole. Each of the types of law considered here is coherent and has criteria to determine what is 'law', thus showing the different bases and statuses of international development law. Taken together, these also show the emergence of a legal structure consisting of norms, principles and rules. All this also points to increasing legalization of international development with a discernable movement towards hard law (illustrated in the aspirational law and hard law chapters).

⁵⁰⁷ WT/L/641.

⁵⁰⁸ Declaration of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) UN Doc A/CONF.48/14/Rev.1, Preamble paragraph 4.

⁵⁰⁹ Declaration on Environment and Development' (Rio de Janeiro 3 June-14 June 1992) UN Doc A/CONF.151/26 (vol. I), principle 5.

Development law displays clearly developing norms, in the sense of the 'normal' way of going on. A norm in development law is that it is right to pursue development. Another norm is the giving of development assistance to developing countries by developed countries. Development assistance includes technical assistance, financial assistance, technology transfer and food assistance. A norm connected to the development assistance norm, is the recognition that developing countries have special needs which developed countries must take account of. There are principles that have evolved such as that developing countries may enjoy preferential treatment in areas relevant to their development. Other important principles include: intergenerational and intragenerational equity; common but differentiated responsibilities; sustainable use of natural resources; the precautionary principle; the principle of participation; good governance; and integration (i.e. of social, economic, environmental and human rights objectives). There are rules, such as a preference granted to one country must be granted to all similarly situated countries. Other important rules include: procedural rules with regard to developing countries as for example article 9 of the WTO Safeguards Agreement or the procedural rules available under the DSU when the dispute involves a developing country member; rules allowing for exemption from general obligations, as for example the WTO Enabling Clause ; rules allowing developing countries lesser obligations as compared to developed countries as for example in the WTO Agreement on Agriculture; rules allowing developing countries a longer time to implement obligations as for example article 65 of TRIPS.

These norms, principles and rules may derive from different institutional settings. They may derive from the General Assembly, or the special agencies of the UN, or from the dispute resolution procedures of the WTO, but they are connected. They draw on one

another, and develop from one another, for example the Enabling Clause drew on and developed from an UNCTAD resolution laying out the objectives that preference systems should serve, and it continues to be a standard by which development provisions are judged.

But certain sites in the process have particular relevance for the production of different aspects of development law. The General Assembly has been in the forefront, for example, of contributing to the general principles behind development law. UNCTAD has been vital in defending and articulating the norm. The WTO dispute settlement body articulates the rules.

Within this 'system' of 'differentiated responsibility' the WTO has a special place. The WTO does not only issue the rules, it has determinate effects on both norms and principles. I give as an example the ruling of the Appellate Body in the Shrimp---turtle case. By reversing the panel's view that any environmental measure must first pass the "threat to the multilateral trading system" test, and by declaring that maintaining the multilateral trading system was neither a right nor an obligation, it was endorsing the idea that there might be a higher value than the right to equal trade. Equally, allowing within Doha that quotas operated by developing countries need not be considered only transitory measures, gives rise to the outlines of a new principle in development law: that development is not merely a transitory condition but a special status, and one connected to its own rights and duties.

Few have been willing to consider the WTO a 'development agency' and the critics of the WTO most frequently cite its failure to 'deal with development'. But this view fails to

consider the critical role of law in relation to development, and the critical role of the WTO in relation to development law. The WTO legal system is a good site for the production of hard development law being characterised by third party judicial settlement of disputes. The hard development law chapter illustrated that development law in the WTO follows Hart's conceptualisation of law as a union of primary and secondary rules. An example of a primary rule of international development law is the obligation developed countries have to provide duty-free and quota free market access to least developed countries. Other primary rules of international development law in the WTO are procedural rules with regard to developing countries, rules allowing for exemption from WTO obligations, rules allowing developing countries lesser obligations as compared to developed country, and there are rules allowing developing countries a longer time to implement obligations. The primary rules of obligation are supported by secondary rules. The secondary rules are as follows: special and differential treatment provisions accorded to developing countries are found in the WTO agreements and as such satisfy the element of the rule of recognition which requires that the proposition must be contained in the WTO agreements. Further WTO panels and the appellate body have considered, applied and interpreted special and differential treatment provisions and affirmed that these provisions are an integral part of the WTO agreement. The rule of adjudication can be seen in the procedure available under the Dispute Settlement Understanding when a dispute involves a developing country member. The rule of change can be seen generally, in article X of the WTO Agreement which stipulates how new primary rules are to be introduced in the WTO and applies to special and differential treatment provisions.

8.2 Implications

The foregoing findings indicate that the earlier understanding of international

development law needs to be revisited. The literature reviewed shows that the earlier studies focused on resolutions and declarations which, at that time, formed the corpus of international development law. These studies therefore centered on the legal significance of resolutions and declarations of international bodies, particularly of the United Nations. Those faithful to the traditional positivist school, did not accept that resolutions and declarations were part of the corpus of international law. Similarly, they concluded that international development law was not true law because its instruments did not reach the threshold of 'law'. Underlying this position is the conception of international law on the basis of consent. However, if we accept that consensus, rather than consent is the basis of contemporary international law and that its sources extend beyond the traditional sources enumerated in Article 38 of the statute of the International Court of Justice, then we must consider resolutions and declarations enumerating international development law. Indeed the earlier literature did concede that the resolutions and declarations enunciating international development law could one day, evolve from soft law to hard law (Slinn), or become increasingly dense in legal character (Feuer). Treaties are of course a traditional source of international law and therefore it is significant that we have today, multilateral treaties enumerating international development law.

8.3 Recommendation for future research

International development law is still relevant today. As such, there is need for an appraisal of how international development law fits in with postulates and doctrines of international law such as equality of states and sovereignty.

It will also be important to keep abreast of state practice to discern any formation of

customary norms in this area. For example the United Kingdom has enacted the International Development (Official Development Assistance Target) Act 2015 which came into force on 1 June 2015.⁵¹⁰ The Act enshrines in law and commits the UK to meeting the target for official development assistance to the amount of 0.7% of gross national income in the year 2015 and each subsequent calendar year. The question is whether this will become a widespread practice among developed countries and to what extent it will be complied with. It may be noted that enshrining this is domestic law suggests that this is a goal that is sincerely desired by the UK government (aspirational law criteria).

Also significant is the ongoing process for the post-2015 development agenda to be concluded later this year. It will be important to identify any new development goals and implementation mechanisms to see whether this will signal a movement towards hard law.

3.4 Final remark

International development law has varying legal statuses and different legal bases. It is true law on the basis of different traditions of legal understanding i.e. positivism, natural law (aspirational law) and law as process. The new international economic order debate from which it was born still has contemporary relevance. making international development law relevant today.

⁵¹⁰ www.legislation.gov.uk/ukpga/2015/12/section/1/enacted accessed 25/07/2015.

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